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Understanding and Mitigating Protests
of
Department of Defense Acquisition Contracts

By

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Executive Summary

The defense acquisition process, which is governed by federal statutes, executive orders, administrative rules, and judicial rulings, includes opportunities for bidders to protest decisions, especially the final award, triggering a review and administrative hearing by the U.S. Government Accountability Office (GAO). In theory, the benefits of allowing protests include more competitive and accountable procurements. The costs of protests include the resources expended by the Department of Defense (DOD) and GAO in responding to legitimate and frivolous protests and delays in awarding and executing contracts. Delays have consequences for both the costs of the contract, defense policy, and national security. This report outlines research on the defense acquisitions process, focusing upon source selections and bid protests, to identify potential improvements.

Bid protests, distrust, and spirals of conflict

Members of the acquisition community generally agree that source selection procedures, while often onerous, are basically fair. Nevertheless, they often distrust each other. Inadequate information contributes to parties attributing nefarious motives to the other participants in the process, generating spirals of conflict. Typically, conflict begins when a rejected offeror, who has made a significant investment in the process, perceives a problem with the selection process and seeks information about it. The second party, a contracting agency that also has made a significant investment, resists. Conversations between the offeror and the contracting office do not resolve the situation. This leads the offeror to protest formally to the contracting agency, or, it skips the formal, agency level review, and protests at GAO or Court of Federal Claims (COFC). Agency level practices, including disclosure during debriefings and protests; protestor practices, including attorneys sifting the record to find and file multiple challenges; and GAO practices, including decisions about which cases are material and the degree of deference afforded to contracting agencies, contribute to perceptions of distrust that promote spirals of conflict.

Source selections, transaction resources, and the economics of organization

Because a bid protest is a conflict between an offeror and a government contracting agency, which arises because the offeror perceives an error in the process employed by the agency, protests sustained by GAO shed light on the agency's management practices. The theoretical perspective that informs our understanding of this has two parts. First, transaction-resource economics treats source selection as a process consisting of linked negotiations and explains the conditions under which they can fail. Every negotiation requires solving three problems: coordination, division, and enforcement. Parties have endogenous resources with which to resolve these problems and reach agreement. The theoretical analysis yields testable propositions about the

factors that strain endogenous resources among the disputants and induce third party involvement, like the GAO.

Second, the economic theories of organizations and dispute-systems design supply a model of management consisting of practices—strategy, structure, human resources, policies, and monitoring—that influence the configuration of linked negotiations and their resolutions. When managers choose complementary practices, the components of the management system are aligned, which promotes productive negotiations. In source selection, this minimizes the potential for unproductive conflicts and the likelihood of protestable errors.

When management practices governing source selection are misaligned, unproductive negotiations and protestable errors become more likely. Participants withhold information relevant to negotiations, neglect issues and fail to follow through on commitments. In short, legitimate protests happen because of organizational dysfunction. What contracting agencies do to create good source selection processes also mitigates protests.

GAO, as a third-party intervener, adds resources to resolve disputes. Sustaining protests sends a signal to agencies to adjust their management practices, that is, the fit between strategy, structure, human resources, policies, and monitoring. We treat third-party interventions that identify errors and contracting agency management practices that give rise to errors as a system governing the source-selection process. Because the risk of erring is endemic in the source-selection process, we look for ways to minimize the sum of the cost of errors and of avoiding them.

Data sources

Based on questions associated with a conflict management audit, we conducted interviews during the last quarter of 2009 and the first quarter of 2010. Respondents included four attorneys and a manager at GAO; executives and in-house counsel at four large prime contractors; four outside bid-protest counsel; government contract managers at two smaller companies who typically are subcontractors; three current or former executives in the Office of the Secretary of Defense; officials and in-house attorneys (as few as two, as many as fourteen) at three military commands: Air Force Material Command, Naval Air Systems Command, and the Defense Logistics Agency (DLA); a Senate Committee staff member; and executives (one or two at each) at professional and industry trade associations, including the National Contract Management Association, the Aerospace Industries Association, the Professional Services Council, and TechAmerica.

We analyzed bid protests posted on GAO's website. We coded all digested decisions issued in calendar years 2001 through 2009. This gave us protests involving the air force, army, marines, navy and the DOD, not including the Army Engineer Corps because it operates under different federal appropriations statutes. Information about cases before the COFC came from a search of the Lexis/Nexis database for 2001-2008.

We also assembled information on all contracting activity generated by DOD during 2001-2009.

Findings

Bivariate charts and multivariate statistical analyses of bid-protest decisions find varying degrees of support for the conventional wisdom we heard from our interviewees and hypotheses derived from our theory. First, DOD's increased reliance on commercial markets increases opportunities for bid protests. However, when DOD increases the bundling of contracts, putting several smaller activities into a bigger contract, fewer contracts implies fewer opportunities to protest. Indefinite delivery-indefinite quantity (IDIQ) contracts also reduce the number of protests. Second, smaller companies generate most of the protests, typically against other small companies; larger companies protest strategically. Both types of companies appear to respond to an effectiveness rate, which combines the rate of sustained protests with the rate at which agencies take corrective actions before the protest has been decided, approaching 50%. Third, the sustain rate is higher for larger firms.

Fourth, protests become more likely when contracts have large dollar values that are a significant percentage of offeror revenues. Fifth, and similarly, protests are more likely when contracts involve long periods of delivery time that can lock out a rejected offeror from a market. Sixth, more complex contracts, like services versus products, generate more protests, probably because of the increased difficulty of writing requirements and evaluating proposals. Seventh, GAO educates the acquisition community, tackling new bases for claims, like past performance and organizational conflict of interest, after which the number of decisions based on those claims trends down. This admits strategic behavior by protestors in deciding what to protest. Eighth, U.S. companies who are rejected offerors are more likely to protest a foreign contract winner than an American winner.

Finally, GAO presents itself as independent of Congress and political pressures. Businesses, however, question its independence. We find evidence consistent with the perception that GAO serves Congress. Among large firms who protest, those in districts whose elected officials serve on more defense-related committees in the House and Senate achieve a greater sustain rate. The same finding does not hold for the COFC.

Members of the acquisitions community perceive connections between the management practices at contracting agencies and the likelihood of protestable errors. Although Federal Acquisition Regulations (FAR) and Defense Federal Acquisition Regulation Supplements (DFARS) guide the process, management practices vary across agencies. The strategic shift toward commercialization occurred without increasing contract monitoring. Changes in the size of the acquisition workforce are not always coordinated with targeted training so that those engaged in creating and monitoring contracts have the requisite knowledge, skills, and aptitudes. Some contracting commands recognize, monitor, and reward performance in source selections, attracting

the best and brightest employees. Others do not. As a matter of policy, agencies run acquisitions with attention to financial, technical, and scheduling risk, but more in contract execution than in source selection. Although source selection authorities might play a role akin to a chief risk officer (CRO) in a private company, it is not always obvious who has a CRO's authority. Nor is it clear that decision-makers take into account the wider range of risks that affect the success of a source selection, including reputational risk, bid-protest risk, etc. Finally, members of the acquisition community call into question GAO's practices in assuring consistency across its decisions and assessing the reasonableness of protests in terms of deferring to agency discretion.

Recommendations

Consistent with alternative dispute resolution (ADR) principles, contracting agencies can mitigate conflicts spiraling into GAO protests and COFC claims. Strengthening agency level reviews can reconcile the interests of disputants at low cost. Peer reviews and greater disclosure through debriefings, as well as reducing the adversarial tone of the debriefings, can increase the parties' satisfaction with the process and the outcomes. Increasing transparency in GAO's standards can promote its educational mission, which in turn can produce more durable resolutions.

Agencies and GAO can improve their system of management practices. The key word is "system." Misalignments can be identified and adjusted in the following ways:

- Moving to market-based purchases may have gone too far. The optimal solution requires reassessing the effective and efficient organization of the means of production, given the role that government chooses to undertake and the costs of production, including the transaction costs incurred during source selection.
- If voluntary participation in government or trade-association educational programs is insufficient, offerors should be required to understand source selection and to be qualified to participate in bidding or make a decision to protest.
- Contracting agencies can assign responsibility for managing the risks in the source selection process to a person, or perhaps the source selection authority or the source selection advisory committee, with proper training and definition of the range of risks.
- Contracting agencies should focus on defining products and service needs as simply as possible to minimize requirements in contracts, and thereby, the complexity of evaluation criteria.
- Agencies should create checklists, preferably based on best practices, at key stages of the source selection process.

- Agencies who re-compete a contract—as a result of taking corrective action or as a result of a GAO opinion to amend or reissue the request for proposal—could be required to do so within a specified timeframe, to give public notice why the timeframe cannot be met, or to request an exemption from the limit.
- Contracting agencies should develop and use a simulation program to train members of the workforce engaged in source selections.
- To attract and retain the best talent, contracting agency employees should be recognized in personnel records and rewarded in performance evaluations for working on source selections. Contracting agencies should create a database of employees who participate in source selections to support decision-making when source selection teams are formed
- DOD and Congress should improve the data they are collecting to monitor performance of the acquisition process from specification of need through contract award, taking into account bid protests or COFC lawsuits, as well as the time required for an agency to amend or reissue a request for proposal (RFP) and complete the selection.
- Agencies should request feedback on the quality of the source selection process and use the information to improve it.

I. Introduction

The bid-protest mechanism used by government agencies, which gives interested parties the right to contest the procedure or outcome of a contract award, is standard practice in the United States, familiar in the United Kingdom and its former dominions, and present in the European Union. A perceived increase in the number of protests during the past few years, including a few visible and controversial ones, drew us to study source selections and protests at the Department of Defense (DOD) (Manuel and Schwartz 2010). Although bid protests have not been a growing problem within the context of all DOD contracting, when they are sustained, their impact can be significant (Gansler, Lucyshyn, and Arendt 2009).¹ Moreover, anticipated reductions in U.S. defense spending are likely to trigger more of them.

Federal statutes, executive orders, administrative rules, and judicial rulings govern the defense acquisition process, although variations exist across contracting agencies. An example of source selection for a weapons system at one agency begins with senior staff deciding to address a need. A program executive officer sets the requirements with input from combat commanding officers in the field. The program office works with the contracting office to develop a requirements plan. They decide upon the type of contract and the acquisitions strategy. The contracting office translates the requirements into proposal instructions and evaluation criteria. The contracting officer decides whether the item should be competed; under the rule of two, if there's more than one potential provider, it must be competed. The Source Selection Advisory Board checks that competition has been obtained and reviews and approves the evaluation standards. Authorized by the Source Selection Authority, the contracting office publishes a request for proposals (RFP). The contracting office receives the proposals, drawing on technical experts to help evaluate them. The Source Selection Evaluation Board submits its evaluation to the Source Selection Advisory Board, which makes its recommendation to the Source Selection Authority, who selects the winner. Approvals are required at steps along the way, especially if the contract is sole source.

The process includes opportunities for offerors to protest agency decisions. Typically, protests trigger a review and administrative hearing by the U.S. Government Accountability Office (GAO). The Court of Federal Claims (COFC) is an alternative forum used less frequently. Rejected offerors have the right to protest if they believe the government has not followed the source selection process it established for itself.

In theory, the benefits of allowing protests include more competitive and accountable procurements (Report of the Committee on Homeland Security and Governmental Affairs 2007, p. 12). Competitive procurements induce more contractors to

¹ According to the Congressional Research Service, the number of bid protests against DOD has increased from about 600 in FY2001 to 840 in FY2008, most dismissed, withdrawn, or settled prior to GAO issuing an opinion (Schwartz and Manuel 2009, p.12-13). On average, GAO sustained only 5% of these protests. During a period when the number of protests filed with GAO increased 39%, federal contract spending increased an inflation-adjusted dollar volume of 80%.

participate in bidding, bringing the best expertise to the process and encouraging efficient, low-cost production. Accountable procurements follow from the possibility of a bid protest, which induces agencies to design and operate source selection processes that 1) are fair and transparent, and 2) minimize the error of selecting an inappropriate vendor.

The costs of bid protests are more tangible than these benefits. Responding to a protest requires the agency to expend resources. Once a protest has been filed, work ceases until GAO issues its decision; waivers to continue work for national security reasons are rare, more so at COFC. Delay has consequences for both the cost of the contract, defense policy, and national security. If the protestor prevails, these costs may increase as the agency remedies the problem. GAO and COFC expend resources to process protests. The rejected offeror incurs costs in filing the protest, as might an awardee who supports the awarding agency. Both business and government organizations have human and financial capital in limbo pending resolution of the protest.

By definition, a bid protest means the parties to a source selection fail to agree on the process or an outcome within it. That is, a bid protest is an artifact of a transaction that leaves one or more parties with a grievance against the government. The First Amendment of the U.S. Constitution says, in part: “Congress shall make no law... abridging... the right of the people... to petition the Government for a redress of grievances.” At the same time, the sovereign is immune to lawsuits against it, unless it explicitly agrees to permit them. In the case of bid protests involving source selections in government acquisitions, the U.S. government effectively honors the First Amendment by creating venues in which parties to the source selection can air their grievances.

Government procurement, given its publicness, relies upon interested third parties, those who do not win contracts for which they competed, to monitor the source selection process by using the bid protest process. This admits third party opportunism: protests lodged for reasons other than obtaining corrective actions, benefiting the protestor at the government’s expense (Spiller 2008). According to Roemerma (1998) and our research, contractor executives and bid protest attorneys report that they will protest to:

- Win and thereby be competitive in a new selection or to recover costs;
- Send the agency a message, be heard, seek justice, when they believe they have been wronged because government erred, even against advice of counsel that the protest is unlikely to be sustained given past precedents and that if it is sustained, the protestor is unlikely to become the eventual winner;
- Obtain information to help them improve their future bids;
- Obtain competitive intelligence;
- Hurt the winner by delaying the award;
- Retain a revenue stream for the duration of the protest at GAO (in the case of an incumbent who loses);
- Demonstrate resolve to board members or senior executives at the losing offeror that everything that can be done to pursue a contract is being done;
- Be granted work under the contract, either by the agency or by the awardee; and

- Improve the protestor's chances of getting future contracts.

Only the first three of these serve a public purpose. The others result from competitive pressures in the marketplace. As an attorney who specializes in bid protests described it, “a bid protest is a conflict exacerbated by commercial rivalry.”

Filing and defending against bid protests have become routine features of doing business with the government (Tomaszczuk and Jensen 1992). From studying protest decisions or agency activities, one cannot easily discern the motives for filing a protest. Nor can one easily discern whether the protestor failed to understand the acquisition process and filed a protest believing the agency erred when, in fact, the protestor erred.

Despite the well-intentioned efforts of skilled professionals throughout the acquisitions community, errors, real or perceived, inevitably occur. We explore misalignments in management practices governing the source selection process that can create conditions conducive to protestable errors. We ask whether changes in management practices, broadly defined, or in GAO's bid-protest process might mitigate the burdens that bid protests impose upon government's suppliers, public officials charged with executing government contracts, and, ultimately, taxpayers. In this context, we also consider whether the bid-protest mechanism is fair. Does it help “to establish justice, ensure domestic tranquility, provide for the common defense, or promote the general welfare” or is it merely an artifact of interest group power?

The information on which we base our analysis comes from two sources. First, interviews with attorneys at the GAO; executives and in-house counsel at large prime contractors; outside bid protest counsel; business contract managers; current and former officials in the Office of the Secretary of Defense (OSD); officials and in-house attorneys at three military commands: Air Force Material Command, Naval Air Systems Command, and the Defense Logistics Agency; Senate Committee staff; and executives—typically, former DOD contracting officers—with industry trade associations. Second, reviews of digested GAO decisions and opinions of protests at DOD between 2001 and 2009. See Appendix A for details of the research methodology.

Section II of this paper reports on a climate of distrust that exists among participants in the source selection process, contributing to spirals of conflict that become formal bid protests. Section III outlines our theoretical perspective: a systems approach to understanding the role of transaction costs and management practices in source selection decisions, explaining the patterns and resolutions of conflicts, including bid protests, that we observe. Section IV reports our findings, starting with patterns of bid protests in GAO decisions that are consistent with conventional wisdom and moving to the sources of conflict in agency and GAO management practices. Section V presents the recommendations that follow from our findings.

II. Distrust in source selections

Members of the acquisition community, broadly defined, generally agree that source-selection procedures, while often onerous, are basically fair. Many of our interviewees believe that greater transparency on the part of government results in better, fairer source selections and reduces bid protests, although not necessarily successful protests. They were especially complimentary of steps taken by acquisition officials to increase transparency. These included agencies disclosing draft RFPs and thoroughly debriefing unsuccessful offerors to help them understand how they could do better the next time (see also Thompson 2009, p. 165). Several cited examples where clear explanations of why they were not selected pre-empted bid protests.

At the same time, the parties do not trust each other. Inadequate information contributes to each attributing nefarious motives to the others, generating a conflict spiral (Carpenter and Kennedy 2001). Typically, it begins when a rejected offeror, who has made a significant investment in the process, seeks information or acknowledgement of a problem. The second party, a contracting agency that also has made a significant investment, resists. Conversations between the offeror and the contracting office do not resolve the situation. The first party perceives the second to be stonewalling, if not deceiving. After the informal protest, the company formally protests within the contracting agency, or, it skips the formal, agency-level review.

With no resolution, other parties begin to take sides. Elected officials, for example, step in to help affected constituents, if nothing else, directing them to lodge a formal protest at the GAO. The contract winner may step in to support the agency. GAO procedures are fairly well defined and often resolve the dispute.

However, a company dissatisfied with GAO's decision can go to COFC or pursue the matter in Congress or with other decision-makers at DOD or elsewhere in the Executive Branch, a process that becomes relatively unmanaged. Some who had no stake in the original substantive disagreement become involved. They may involve the media and others to make their case, expanding the conflict. Because people tend to talk more with others of similar views than with those who disagree, positions harden and perceptions of the problem become rigid.

As the conflict escalates, communication becomes fraught; misunderstandings multiply. Zealots replace moderates and start investing resources to win rather than to resolve the disagreement. In the case of bid protests, the desire to win may be dominant from the outset. A trade association official described contractor motivations as:

...almost a military mindset in dealing with the competition. Not winning is unacceptable. If you don't win, you can't perform. Number 2 is to perform with excellence. When you bid you commit money and people. 'Take the hill.' The compulsion to win is like the military.

This leads to more appeals to citizens and authorities outside the immediately affected stakeholders. Perceptions distort: parties lose objectivity, gray areas become black or white, seemingly innocuous behaviors become meaningful as distrust and suspicion grow. Uncertainty about the outcome generates anxiety.

Finally, having left behind solutions that might have been feasible early in the process, the conflict consumes resources that the original parties never intended to commit. The outcome, often from an authoritative source like Congress, might put the matter to rest but not be efficient, effective, or widely supported. In the end, the conflict has consumed significant time, energy, labor and other resources. In sum, a relatively innocuous matter can grow into a spiral of unmanaged conflict, even though the procedures for dispute resolution seem clear. The story of a high value, high profile protest like Boeing's on the KC-Tanker fits this dynamic (Sanders 2010; Sanders and Mullins 2010).

Perceptions of bias in source selections

The acquisition community does not believe the process is entirely without bias. Consider agency level reviews. At the Defense Logistics Agency (DLA), for example, contracting officers respond to concerns at the lowest level when there are selection problems. Some of it has to do with educating offerors. An offeror can go to a contracting officer and, if the offeror is correct, the contracting officer will rectify the situation. If an offeror formally protests to DLA, it can choose to go to either the contracting officer or to the chief of the contracting officer, but not both. No appeal within DLA is possible; the next step is GAO. Agency attorneys become involved once the protest goes to a contracting officer. In compliance with an executive order requiring agencies to create alternative dispute resolution (ADR) mechanisms, DLA has an internal ADR process with trained mediators that the agency believes is effective.

However, few of our interviewees found agency level reviews to be efficacious (Toff 2005). A bid-protest attorney recommends against them:

Why will an agency correct its own mistake? It's more likely to circle the wagons. An agency review is a single filing, no discovery, and you wait for an agency to decide. If the agency happens to agree with you, they'll call you and say they'll redo the solicitation.

A legal practitioner with a contractor finds agency reviews to be a useful tool, a way to raise an issue with the agency, and to give the agency the opportunity to act or respond, without the need for a more formal process, and without delaying the procurement process. In general, though, frustrated offerors do not see this as a neutral venue.²

² Agency level reviews during the RFP drafting stage, especially involving technical issues, can be more helpful to the agency than to the company. What makes agencies nervous about one-on-one conversations with companies is that a company will try to influence the definition of requirements or the evaluation scheme to favor the proposal it intends to submit. One trade association official described this as "a Kabuki

Once the solicitation has been published, businesses believe the agencies have a vested interest in it and tend to be dismissive of inquiries from companies. Questions companies pose will be public. So, as one trade association official put it,

...merely asking a question at this stage or the content of the question may reveal information to a competitor that you don't want to reveal. For example, you are the Wright brothers and you have a plane that flies 103 mph; the agency RFP asks for a plane that flies 105. If you ask whether the agency would accept a bid with a plane the flies 103 but adds other features, that is, would the agency scale back the requirement, you've told your competitors something about your product and the state of your technology that you don't necessarily want them to know.

Here, transparency in government comes into conflict with proprietary information in the competitive market, undermining the efficacy of agency level protests post publication.

Many members of the acquisition community also perceive that Democratic administrations favor some firms, Republicans others, that defense agencies have their pets, and that the GAO decisions reflect congressional preferences. A few cited specific examples that confirmed their suspicions, but most were based on little more than hearsay. What is remarkable about these responses is the distrust the participants expressed about the acquisition process, despite the fact that, when queried about their own experiences, they often described the officials they had direct contact with as open, helpful, and informative.

Several factors bear on this. First, a rejected offeror, not having achieved its objectives, will blame the process. This, frankly, is human nature, a "self-serving attribution" that is well documented (Malhotra and Bazerman 2007, p. 135). As a trade association official put it: "When you've lost, you distrust the system and believe the decision was wired for someone else."

Second, smaller companies, who comprise the majority of offerors and a disproportionate source of protests, are not as sophisticated as larger companies. Smaller companies may not devote resources to obtaining contracting expertise or in-house or outside protest counsel. As a result, the company errs but believes the government did. The small company might protest because it believes an injustice has been done. Indeed, it might perceive a bias based solely on its size, a view expressed by a business executive at a smaller firm who said, "No one gets fired for hiring Raytheon, but someone can get fired for hiring [my company]." In contrast, the decision to protest for a large company with multiple product lines is a business decision based on an assessment of the potential outcome versus the cost of pursuing the protest.

dance." One-on-one conversations are more productive, however, than industry days, where agency personnel present their initiatives and requirements to an audience of representatives from industry. In the view of some interviewees, industry days allow companies to learn more about who their competition will be than about the requirements or evaluation to be used in a source selection.

Third, companies create advantages for themselves, sometimes in ways that undermine confidence in the contracting process. For example, a company wants to be a player and buys expertise about the contracting process by recruiting contracting officers from government agencies. Their competitors believe that these contracting officers will trade not only on their expertise about the process but also on their relationships with decision-makers in the contracting command.

The source selection process also involves recurring conflicts, adding another level to the dynamic and triggering other spirals, once one starts. A visible, sustained protest on a high value contract, like the KC-Tanker, sends a signal throughout the contracting community. According to a bid protest attorney:

Lots of contractors now think that if they work hard, turn in a good bid, and protest vigorously, they might win, as Boeing did. Many more contractors are thinking about protests. [My firm], which is not a major protest shop, has handled twice as many protests during the past two years as in the previous two.

People assign outsized significance to low probability events with significant impact, like a sustained protest on a high value contract.

Agency and contractor practices and distrust

The source selection process is rife with opportunities for miscommunication and misperception, sometimes unavoidably. In one dynamic, contracting commands need expertise from their suppliers to define requirements. Not all suppliers have the access, experience, and resources to respond. The result can be requirements that preclude some suppliers from qualifying. Regulations designed to create fairness can have the opposite effect, according to a business executive: people who know how to play the game will prevail. Companies require huge contracts to afford to be players and will acquire successful smaller companies. The big companies respect each other but not necessarily the agencies.

A second dynamic plays out when requirements or evaluation criteria are not clear. Firms can ask for clarification. Some are better about this than others. One business executive said, “We promote a culture of communicating. Assume nothing. We’ll go to an agency and say, ‘We think you’re saying X. Is that correct?’” If agency officials receive no comments or requests for clarification, they might assume that the requirements are clear. However, some companies assume they understand what they don’t. According to a bid protest attorney,

Some companies are dominated by technicians with great expertise. They think they know what’s best for the client. ‘I know more than this customer. I have a good product and they should buy it.’ They assume that the company’s reputation means it need not respond to the RFP point by point.

In these situations, each party makes assumptions about the other that prove to be incorrect, generating distrust.

A contracting agency official described perceptual problems that can trigger a third dynamic: “Even big companies believe government looks only at lowest price, not at best value.” Businesses executives concur (Schofield 2009, p. 53). The underlying problem is that evaluating “best value” requires balancing price, performance, and other characteristics. Its inherently subjective nature induces businesses to distrust the process. This is especially of concern with A-76 programs where government considers competitive outsourcing for goods and services being provided by a government agency.

Aware of these problems, government installs regulations, typically in Federal Acquisition Regulations (FAR) and Defense Federal Acquisition Supplement (DFARS) designed to elicit more complete information. Ironically, business executives fear that constraints imposed by the FAR and DFARS undermine communication between agencies and vendors. Companies see solicitations containing boilerplate from the FAR that contradicts something else in the contract. “It might be a minor thing, but it suggests a lack of professionalism and larger problems” according to a bid protest attorney.

Later in the process, after receiving responses to RFPs, the government may enter into discussions with offerors to establish a competitive range consisting of the most highly rated proposals. Discussions are not always meaningful. For example, an agency needs a replacement part that has been approved by the military service. The part needs to come from a specific manufacturer or someone licensed by that manufacturer. The protestor says, “I can do that,” but has not been approved by the military service as a supplier. The protest results from unclear discussions, according to one contracting agency, because the agency is worried about saying too much for fear it will be exposed to claims of unfairness in a protest.

Over 25 years ago, companies were protesting contract awards to obtain information to help them improve their bids so they could be more successful in subsequent competitions. In the Federal Acquisition Streamlining Act of 1994, Congress formalized agency debriefings upon request. Rejected offerors may request information from the agency about the basis for its selection decision and contract award. A contractor can ask for information about the rejection of its bid. Most participants credit this for a decline in the number of protests.

A protest attorney believes agencies are doing a better job of debriefing contractors, helping them do better in the next competition. The unstated benefit of conducting a debriefing is to prevent a bid protest by explaining the reason for agency decisions so the potential protestor will see that the agency acted within the bounds of its discretion and consistent with its evaluation plan. Ironically again, debriefings can contribute to the climate of distrust because FAR gives a contracting officer considerable discretion in the content of debriefings.³

³ 15.506 (b) Debriefings of successful and unsuccessful offerors may be done orally, in writing, or by any other method acceptable to the contracting officer.

At one agency, a vendor might receive a ten-minute review, scripted by an agency attorney, with a contracting official showing one or two Powerpoint slides containing the minimal amount of information required by the FAR and minimal opportunity for the rejected offeror to ask questions. At a second, the vendor might receive an analysis of what the contractor did or did not do that was problematic. At a third, the vendor might receive a two-day review by multiple members of the source selection team, including engineers and attorneys, presenting essentially the same information conveyed to the Source Selection Authority; the winner will be asked permission for the agency to explain to rejected offerors why the agency selected the winner, albeit with competitive information redacted. The rejected offeror has ample opportunity to ask questions. Even within the same agency, people disagree on which debriefing approach to implement.

Some agencies apply a standard of disclosure tied to surviving the protest at GAO, which is different from one tied to serving the contractor as customer or partner. The engineers, attorneys, or head of a business unit need to explain to the team that spent time working on a bid why the company lost. Executives to whom they report want to know, as well. If the standard geared to surviving the protest at GAO results in the agency sharing less information, it puts the company on guard. The company responds by bringing attorneys to the debriefing, which the agency perceives as a threat, fueling the agency's distrust of the company (Szeliga 2008). In a classic illustration of a conflict spiral, the dissatisfied company files a protest and contracting agency executives have to explain to their team, who also spent time working on the source solicitation, evaluation, and selection, why the company filed a protest, and, potentially, why GAO sustained it.

Where an agency discloses as much to rejected offerors as it would to the Source Selection Authority, some will be grateful and satisfied. Bid protest attorneys and mid-level managers can report useful information to their clients or senior company officials. However, in the agency's view, some rejected offerors will comb the information to find bases for challenges. Bid protest attorneys and executives at contractors say as much. A business consultant and contractor said, "Even if you give a contracting officer a script for the debriefing, written by an attorney, a rejected offeror can find a problem in a gesture or a phrase."

(c) The contracting officer should normally chair any debriefing session held. Individuals who conducted the evaluations shall provide support.

(d) At a minimum, the debriefing information shall include—

- (1) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;
- (2) The overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror;
- (3) The overall ranking of all offerors, when any ranking was developed by the agency during the source selection;
- (4) A summary of the rationale for award;
- (5) For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror; and
- (6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

An agency attempted to mitigate this on a large acquisition project by being as transparent as it thought it could be on the theory that the more vendors knew and understood its decision-making at every step of the process, the lower the likelihood the vendors would protest. It held industry days and invited potential offerors to informational sessions throughout the source selection process. The agency prepared the requirements, then briefed the Source Selection Authority, then briefed the vendors, then made adjustments, then put together evaluation criteria, then briefed the Source Selection Authority, then briefed the vendors, then made adjustments, and so on. It tried to help contractors understand everything.

Some offerors sent not only their engineers and managers to the early sessions, but also attorneys who appeared to take copious notes. That these attorneys might have been on the operations side, helping to decide whether and how the company should bid, is irrelevant from the agency's perspective. The agency perceived that the lawyers would hold the agency accountable for every word it uttered; if its final decisions in issuing the solicitation or executing the selection deviated slightly from anything it said, that will be the basis for a protest. A rejected offeror filed a protest. Not surprisingly, the agency sponsoring the open solicitation will not do so again. Less information will be divulged, which pushes the parties further into the cycle leading to a protest.

Agency fears of vendor attorneys are not misplaced. A bid protest attorney said:

We're tactical field generals in a war. We should target one pass, but we don't know where the pass is. So, we attack across twenty different issues. It's inefficient. I want all of the information I can get because I'm going to file supplemental protests. I don't like doing it, but I do it.

In deciding whether to protest, a prime contractor's general counsel said he would solicit information from everyone in the company involved in the process, including attorneys on the operations side. At one time, attorneys did not attend debriefs. Now, they attend and get involved earlier in the process. A prime contractor executive said,

The decision to lodge a bid protest used to be at the operational level. Five years ago, it became a decision made by the office of the company's general counsel. If the agencies are becoming paranoid because attorneys are involved earlier so agency people become more cautious in what they say, remember the old saying: 'Just because you're paranoid doesn't mean someone isn't out to get you.' However, I can't think of a case where a protest was sustained on the basis of oral discussion like industry days. Maybe this could contribute to a protest based on flawed 'meaningful discussions.'

This company also is being more thoughtful in helping the contracting agency defend itself against a protest if the company wins.

While some business executives maintain resolutely that they go to debriefings to find reasons not to protest, agencies cannot necessarily discriminate them from

companies who protest as a business practice. Some protest attorney clients say, “Let’s file a protest so we can see the record that wouldn’t otherwise appear and maybe we’ll find something. If there’s nothing in the record, then we can always withdraw the protest.” Not surprisingly, a protest attorney believes agencies build three months into their schedules for large contracts to account for bid protests, and companies build the cost of a protest into their overhead. In the spiral of conflict, perception matters more than substance, and the reciprocating reactions contribute to an adversarial tone, which is why agency officials admit, “there’s not much trust.”

After companies file protests, disclosure practices may not be consistent across agencies. Anticipating a protest, one agency might have documented every step it took from the outset and be prepared to reveal all but competitive information. Another might not create a file, as in a legal discovery process, until the protest has been filed. And if the bid protest targets a particular part of the process, an agency can look to what the regulations require it to disclose and focus its disclosure on the part of the process addressed by the protest. According to representatives from the Office of the Secretary of Defense,

You want in the contracting officer’s statement of facts that you have all of the evidence germane to the section of the procurement that is being protested. Otherwise, you risk providing the protestor with more grounds to protest. If you can convince the GAO that you’ve got the information you need to support your decisions, you’re ahead of the game.

The presumption that the protestor will be looking for grounds to protest is a sign of distrust.

If a rejected offeror is unable to distinguish an agency that discloses more from one that discloses less, it has an incentive to file multiple challenges, increasing the costs to the agency and irritating its decision-makers. Vendors often submit bids in multiple volumes, one volume on management capability, another on technical specifications, another on pricing, etc. The offeror wishes to understand how the agency evaluated its proposal in its entirety. If the debriefing yields insufficient information, and the offeror files a protest over agency evaluation of technical merit, it might learn that the agency’s evaluation had implications for its evaluation of the offeror’s pricing proposal, but unless it questions pricing as well, it may not receive from the agency information about those considerations. Out of this distrust, offerors and bid protest attorneys make more claims than they would make pleas if they were filing in a court. Moreover, the dissatisfied offeror will mine the debriefing for every shred of information that could be the basis for a protest.

Time pressures associated with GAO’s mandated deadline for filing protests contribute to the shotgun approach. As a bid protest attorney said:

You have five days to file. You haven’t seen the record. You have to raise an issue to preserve it. If you don’t raise it during that 5-day period, you can’t file it.

You're doing it blindly. Your strategy is to say: "Here are the things that could be issues. But we don't want to waive any issues, which you do, in effect, if you don't raise it initially." The ability to file an amended protest helps a bit. But you risk getting caught in a procedural argument: We told you about this in the debrief and you should have known about it from that or other sources but didn't file the claim initially, so you cannot raise it later. Why take on the procedural argument? Agencies fear the rejected offeror will exploit their every word, so utter fewer of them.

Businesses fear agencies will utter fewer words, so try to pry more out of them.

The paranoia doesn't stop there. Agencies say that protests are part of the source selection process and they do not and legally may not hold a grudge against a protestor, treating a protestor with prejudice during a subsequent selection. They respect the right to protest. Vendors hear that but, as a consultant to many offerors put it: "The contracting community lives in fear of retribution for protesting." A vendor protests, then loses a subsequent contract and attributes the failure not to its unresponsive bid but to the agency seeking retribution. Or, vendors experience retribution for poor performance in the business world and project it into the government world. Offerors believe that protests impact careers in the agency, leaving its decision-makers with prejudice. As one put it: "In a Byzantine field, individuals make a difference. They remember."

The business executives' fears are not necessarily misplaced. A former contracting official, now with a trade association, described the ease with which an agency can exact revenge. Suppose a contracting official wishes to punish a vendor who protested and subsequently plans to bid on a contract to be performed outside its geographical area in competition with vendors close to the location of performance. The contracting official specifies in the solicitation that expenses will not be reimbursed for travel in excess of fifty miles, effectively denying the target offeror an opportunity to bid.

Stories like this fuel the distrust that contributes to a spiral of conflict, reaching on occasion into the halls of Congress. According to a trade association official:

There's a sunset on a Congressional provision that allowed protests on task orders above a certain level. My trade association and members wanted to allow the sunset provision to take effect. But bid protests have become a more standard tool in the toolbox that's required to do business with the government. A large, multi-billion dollar government contractor is suggesting that the trade association reconsider its position and support extending the ability to protest because government mismanagement and workforce capabilities are such problems.

It also reaches into the bowels of the agencies and businesses. An exchange program, which transferred employees between business and government to improve communications, failed. A trade association official observed: "The business guy was seen within government as a spy, trying to get a leg up on the next competition, and the government guy who went to business was tainted when he returned."

GAO practices and distrust

GAO maintains that it operates on professional principles, immune from political influence by members of Congress. People in the business world do not believe GAO can be immune. A legal practitioner at a prime contractor said, “No matter what the issue is, you can find GAO opinions on either side. GAO tries to keep the politics out of it. I don’t know how they do it when their bosses in Congress are calling them in to testify at hearings.”

Businesses seek congressional assistance in securing a contract or in protesting failure to win. GAO believes members of Congress like being able to direct their constituents to GAO for a neutral hearing, rather than having to do battle over the matter with another member (Cf. McCubbins and Schwartz 1984). Nonetheless, as elected officials are wont to do, they will take credit for GAO decisions that favor their constituents. They may not assert that they exerted influence successfully at GAO. They only need say that they “worked to support their constituent,” which might have meant writing a letter asking for GAO’s prompt attention. The damage to perceptions is done.

GAO attorneys discriminate frivolous from legitimate protests—those that point out an error in a contracting agency’s processes. They also differentiate among legitimate claims those that are material—meaning the outcome of the source selection might have been different but for the agency’s error—from those that are immaterial. In that sense, GAO, in effect, applies a standard of reasonableness in its bid protest decisions and works diligently to maintain that standard with consistency. Naturally, GAO attorneys prefer that frustrated offerors not throw the metaphorical “plate of spaghetti on the wall” to see if something sticks because it makes more work for them.

However, members of the acquisitions community on both the government and the business side believe GAO’s standards of reasonableness and materiality have eroded, encouraging more protestors to file protests and more protests to involve frivolous and immaterial claims. As one senior agency official said,

Sometimes, we weren’t smart enough to put a value on something in our initial RFP, engineers catch it, and we amend the RFP, although most amendments fix things that aren’t profound. Still, this exposes us to a bid protest. We could cancel the RFP and start over, but that also exposes us to a protest.

The agency wants GAO to defer to it in this situation. GAO disagrees that its standard of reasonableness has declined. An independent legal analysis might confirm that it has not. What matters for a spiral of conflict, however, is the perception that it has.

Similarly, some agencies and some legal practitioners expect GAO to follow precedent but perceive that it does not. Others believe GAO exercises discretion in the areas where it chooses to rule and on the direction of its rulings by, as a bid protest attorney put it, ignoring facts in one case that are the same as in another case and should be determinative in both. GAO and other members of the contracting community agree

that when a new area of dispute arises, such as evaluating past performance in the 1990's or organizational conflicts of interest in the early 2000's, GAO will find merit in many claims in the new area and begin sustaining quite a few until, like judicial precedent, the legal community obtains more certainty about the likelihood of certain claims prevailing. Then the number of those claims trails off.

For good or ill, GAO's pursuit of its educational role confounds its pursuit of its policing role, reinforcing a perception of inconsistency. Here is an example from a bid protest attorney's perspective:

GAO depends on what businesses bring to it in terms of what it can educate the acquisitions workforce about. I may have a past performance argument that's great, but GAO has sustained three of 150 past performance claims, so it won't target this. If I bring something new to GAO, a little gem of an issue [a claim based upon a detail in the execution of a discussion], that may get their attention as something attractive that allows them to educate the acquisition workforce. GAO doesn't care about the protestor in this case; it cares more about announcing law to the acquisitions community. GAO would not agree with me. GAO will say: absence of adequate documentation, lack of meaningful discussion or unequal discussion, organizational conflicts of interest: in these hot button issues, if you come to the door with that issue, you'll win. So my argument doesn't apply over all issues.

That contractors, agencies, and GAO disagree over GAO's standards and rules of procedure speaks to another misperception that fuels conflict spiral: protestors expect GAO to operate like an Article 3 court. However, GAO has an alternative dispute resolution mechanism (with a specialized form of ADR nested within it—predictive dispute resolution—where GAO predicts what the ultimate decision will be based on a preliminary analysis; it resolves a high percentage of protests by parties who participate in it). The process at GAO looks like nonbinding arbitration, although it does not fit neatly into any traditional model of ADR. Arbitration, chosen primarily for its finality and efficiency, is more about consistency—within limits. Something akin to a precedent can emerge but not as rigorous a body of precedent and law governing discovery and evidence as an Article 3 court (Metzger and Lyons 2007).

The formality at GAO has increased. Prior to 1984 when GAO received statutory authority for deciding bid protests under the Competition in Contracting Act, GAO did not hold hearings as a process for fact-finding under oath. It held conferences where parties presented arguments. GAO now holds hearings—not under oath, so no one can be held liable for perjury, but under the False Statement Statutes, which can lead to one year in jail and a fine. A process designed to resolve conflicts in a quasi-adversarial setting has some of the trappings of ADR and some of common law courts without a fully fleshed out discovery process. The more GAO acts like an Article 3 court, the more it risks being distrusted by those who hold it to the standards they apply to a court.

III. Transaction cost theory, the economics of organizations, and conflict

In a classical economist's world, no one engaged in source selection would have anything to do. Decision-makers would know the characteristics of the products and services required to accomplish anticipated tasks; requirements would be self-evident and accurate: no industry days, no discussions. Products would be homogeneous, their quality easily discerned with many suppliers and many buyers: no technical evaluations. Multiple contractors could redeploy instantly to their highest valued uses the resources required to produce whatever the customer wants; if a contractor erred, another could immediately replace it: with no evaluations of contractor past performance. The choice of contractor would be immaterial. Prices would fully reflect the opportunity costs of resources used to produce them; the quantities and qualities of products would match demand: no need to design an acquisition strategy to incentivize contractors or induce them to disclose information. Projects could be split into small pieces with readily available substitutes so no supplier has bargaining power. For that matter, no buyer would have bargaining power and contractors could easily find other purchasers. In the classical economist's world, resources are scarce, but prices contain all of the information anyone needs to make a decision without conflict. Transaction costs—the costs of searching for and agreeing upon contracting opportunities, of dividing the gains from contracting, and of monitoring performance—do not exist.

In the real world, source selections and everyone engaged in them are transaction costs. The distinguishing features of defense acquisitions are uncertainty, complexity, and urgency, which are associated with barriers to entry and bilateral monopoly (Peck and Scherer 1962). Does this mean that economics has nothing to say about source selections in DOD contracting? No. Many economists no longer live in the world of perfect information (Melese, Frank, Angelis, and Dillard 2007). Models treating information as a cost yield useful predictions (cf Laffont and Tirole 1993). When behavior in the real world does not comport with behavior predicted with perfect information, we can explain and predict what we observe in terms of rational actors economizing on the cost of information. In transaction cost economics, that is the engine of the analysis.

In theory, the source selection process is a series of transactions. Identifying and agreeing upon a need that can be addressed with a product or service comes first. Translating the need into specific requirements, choosing a contracting strategy, crafting evaluation criteria, and publishing a request for proposals or invitation to bid involves a second set of transactions, which can trigger pre-award protests. Finally, receiving proposals, evaluating them, and making the award involves a third set of transactions, which can trigger post-award protests. Protests, if an offeror perceives an error, and corrective actions, if the agency acknowledges an error or GAO sustains a protest, are part of the process. Given the multiplicity of interests, responsibilities, and resources brought into these transactions by the participants, we view the source selection process as a mechanism for managing conflict.

In theory, every organization that is part of the process can be viewed as a nest of linked transactions. In this perspective, decisions within and between organizations that are engaged in source selection result from visible and hidden, direct and indirect negotiations among individuals (Lax and Sebenius 1986). The process by which individual transactions aggregate into an organizational decision does not require that parties agree on common goals. Nor does it require that everyone concur in the outcome.

It only requires that they adjust their behavior mutually if they have an interest in preserving a working relationship as a means of allocating resources and making joint decisions. By implication, management consists of influencing—by a host of means not limited to direct orders, systems manipulation, or appeals to common goals—a complex series of bargained decisions that reflect the preferences, interpretations, and resources of subordinates. (Lax and Sebenius 1986, pp 20-21)

Conflicts arise because no individual has the mandate and resources to achieve the organization's objectives. The mandate and resources are shared because people specialize and develop expertise in performing different functions. Interdependence and conflict go hand in hand. In these transactions, people enter into agreements to secure mandates and resources to accomplish them. This is an apt depiction of the source selection process.

A bid protest is a conflict between an offeror and a contracting agency that arises because the offeror perceives an error in the process employed by the contracting agency. Protests sustained by GAO therefore shed light on the management practices employed by organizations in the process. We posit that misalignments in these practices generate errors and unproductive internal conflicts within contracting agencies that spiral into protests by external parties. By studying outcomes—legitimate bid protests—we can understand and improve the processes (see also Mayer and Khademian 1996).

Thus, our theoretical argument runs like this. First, we describe organizational processes as negotiations and the conditions under which they can fail (Heckathorn and Maser 1990; Maser 1998). Next, we apply methods and concepts from dispute systems design to explain how management practices align the elements of those negotiations (Costantino and Merchant 1996). Traditionally, this informs the design of an alternative mechanism for mitigating and resolving disputes (Ury, Brett, and Goldberg 1988; Slaikeu and Hasson 1998; Stitt 1998; Lynch 2001; Conbere, 2001; Lipsky, Seeber, and Fincher 2003; Shariff 2003; Bordone 2008). Rather than design an alternative, we treat the principal organization as a dispute resolution mechanism and identify misalignments in its workings. The theoretical analysis yields several testable propositions.

Transaction resources and the resolution of conflicts

Transaction resource theory, a marriage of game theory concepts with the economics of information, identifies the conditions under which individuals will fail to resolve conflicts left to themselves and will require the services of a third party. All

transaction costs are information costs (Heckathorn and Maser 1990; Maser 1998). A central challenge to organizations is to develop and implement methods of aggregating the information that they need to coordinate the activities of their employees, substituting for the price system—the primary mechanism for coordinating individual transactions outside the organization (Posner 2010).

During a source selection, people resolve problems within a contracting agency, or between a contracting agency and an outside stakeholder, in ways that can themselves be seen as contractual. Every contract secures cooperation by stipulating, first, actions to be carried out by participants at some time in the future and, second, rewards and penalties to be meted out following compliance. According to transaction resource theory, every group has within it a finite stock of resources that facilitate cooperation. Called endogenous transaction resources, these are the prerequisites for solving three problems of cooperation: coordination, division, and defection.

To illustrate this in the context of source selection, consider a decision to acquire a new helicopter for use in the field. Multiple decision-makers have to solve three problems that take a multiplicity of forms. The first one is a coordination problem. Decision-makers must conclude that the net benefit from designing and delivering the new equipment is positive. Information about the need for the helicopter has to come from war fighters in the field and be channeled into the acquisition process, or from war fighters who transfer into positions within the acquisitions process and have the authority to influence decisions, or from an analysis of military performance that identifies a gap. Multiple parties will have to agree upon the purposes to be served by the new helicopter and that those purposes are not being served cost-effectively by other equipment, either because existing equipment has aged or has capabilities that no longer fit with field conditions.

With coordination problems, it is in everyone's interest to collaborate and to agree on the outcomes because they have a common interest in serving the war fighter, although stakeholders bring different perspectives and resources to the negotiation. The prerequisite resources for coordinating include knowledge about established norms, communication channels, and signaling mechanisms, all features we observe in a source selection. Agencies must identify qualified suppliers. Endogenous resources expended on defining the market, crafting requirements, informing the industry, and discussions with individual firms are safeguarding against the uncertainty of incoordination and infeasibility.

Businesses may not participate in these activities equally. For example, although the government says that it wants feedback, it is not clear to small businesses that they have the opportunity to comment on solicitations and product designs even if they have the endogenous resources to do so. They may pool their resources and turn to a third party, such as a trade association, to monitor and participate in defining the general rules for a source selection and to report to its members on upcoming competitions.

The second problem is a division problem. Decision-makers must decide whether the new helicopter has a higher priority, given limited budgets, than competing programs: the “who gets what” part of the decision. More detailed decisions about the equipment, such as its performance characteristics and requirements—carrying capacity, weaponry, fuel capacity, speed, maneuvering ability, durability under different conditions, etc.—raise issues on which different stakeholders with different priorities will take different positions. Engineers will have one perspective, financial analysts another, operation and maintenance personnel a third, and so on. Different offerors have different business models and production capabilities. Parties engaged in setting requirements will have to agree, given the multiple performance expectations of products and services and the technical tradeoffs required among them.

The prerequisites for resolving division problems include independent sources of pertinent information with which to assess competing claims. People in the selection process have an endogenous stock of transaction resources to expend on division problems: technical expertise, managerial experience, and so on. Inviting companies to compete in pursuit of a profit necessarily creates an opportunity for them to attempt to redistribute profits and rents, especially when a monopsonistic buyer like DOD can be influenced on other than a purely product performance basis. In this situation, agencies adopt procedures to safeguard against, for example, decisions that inappropriately favor one platform versus another, operational versus maintenance requirements, or one offeror versus another.

The third problem is a defection problem. Within the source selection process, individuals will have to translate requirements into the criteria by which proposals will be evaluated, including the ability of vendors to perform in accord with their proposals. The prerequisites for assuring performance include the ability to monitor compliance with an agreement and to sanction noncompliance. The process is fraught with uncertainty about whether parties will default. Again, the parties are not without endogenous transaction resources with which to safeguard against failures to comply: experience, records of past performance, technical expertise, etc.

The three problems are intertwined as are the solutions to them. Search costs include resources expended by government on defining requirements. Division costs include resources expended on evaluating bids. Enforcement costs include resources expended to assess offeror past performance and capacity. Agencies expend resources on recruitment and training that addresses all three.

For example, division problems can intrude upon solutions to the coordination problem. Search costs include forecasting demand over time so that the government is not always a buyer in the spot market. If government delegates forecasting to a prime contractor, solving its coordination problem, then this information provides the prime contractor with an advantage in preparing its proposal.

The rules governing source selection invariably reflect efforts to resolve these three problems (see also McCubbins, Noll, and Weingast 1987). Rules against bribery,

favoritism, and unethical behavior safeguard against defection from a focus on best value. They impinge upon the solutions to the division and coordination problems, assuring participants in the process that they will be treated fairly so their investment in bidding will not be wasted, thereby inducing participation and reducing government's search costs (Schooner 2002, p. 14).

Rules governing an agency's process—announcing requirements, articulating the evaluation criteria and process, notifying everyone about the outcome, debriefing rejected offerors, and providing protest procedures—signal that the information contained in prices is neither necessary nor sufficient for the buyer and seller to reach optimal decisions. Similarly, rules governing the contractor, such as that it be “responsible”—have adequate financial resources; be able to comply with the schedule; have satisfactory records of performance and integrity; have necessary organizational experience, controls, and technical skills; have necessary production, equipment, and facilities—require that DOD understand the company and its processes, and vice versa, much more than if all that mattered were the price the government would be willing to pay and whether the company has a product or service it can offer at that price. When the price mechanism works, transparency about the factors that go into the purchase decision and into producing the product need not be conveyed; when it fails, rules requiring transparency generate the information buyers and sellers require. The increased costs relative to relying upon the price mechanism may preclude some offerors, especially smaller ones, from participating, reducing the efficacy and equity of outsourcing (Trepte 2004).

Rules promoting efficiency tend to mean administrative or transactional efficiency, which is not an absolute priority but is a competing one (Schooner 2002, p.9) They intend to reduce overall contracting costs. Yet tradeoffs exist among the sources of these costs. The steps to reduce defection might increase search costs. For example, when past performance is a criterion for contract selection so as to mitigate the risk of defection, search costs increase. And if contractors have an opportunity to respond to information about their past performance, that creates division costs.

Rules promoting “best value” safeguard against incoordination. Following these rules can displease the customer. The war fighter strives for peak performance and wants to reduce the risk of product failure. It can be a matter of life or death. Indeed, customer pursuit of high performance may favor specific vendors, which conflicts with the objective of open competition. Government always makes these tradeoffs. The question is: who should make them and be accountable?

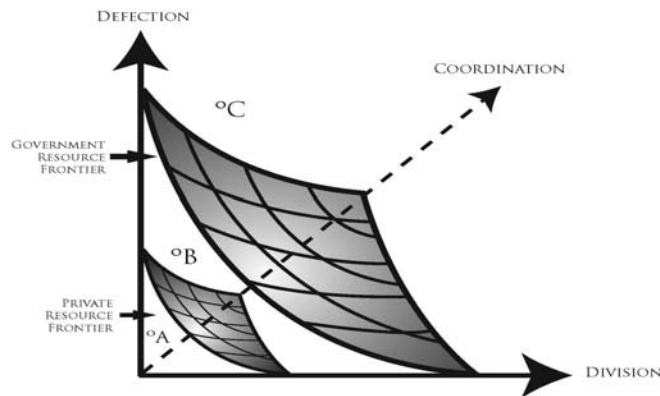
Rules promoting uniformity across agencies require that they buy the same way, applying the same laws, rules, and practices. Sellers do not have to learn new rules to do business with different agencies. Costs to train government managers will be lower. Employees have flexibility in moving to different agencies, which means their investment is not specific to one (Schooner 2002, p. 14). These rules reduce search costs.

On top of these rules are rules designed to achieve a variety of social objectives: supporting domestic firms and small businesses, drug-free workplaces, occupational

safety standards, compliance with labor laws, sustainability, environmental protection, and affirmative action (Schooner 2002, p. 12). Here, the government intrudes upon the basic purposes of the economic system: what to produce, how to produce it, and who gets the product. These rules are solutions to a division problem—whose interests get priority—and impinge on search costs, increasing the risk of less than optimal performance by the products or services.

To take into account the variety of ways in which search, division, and enforcement costs impact the ability of participants to conclude transactions, we employ the concept of a multidimensional transaction resource space. In Exhibit 1, axis 1 represents the magnitude of the coordination problem. Axis 2 represents the magnitude of the defection problem. Axis 3 represents the magnitude of the division problem. In transactions close to the origin (point A), people have sufficient transaction resources among themselves to secure cooperation.

EXHIBIT 1
TRANSACTION SPACE DIAGRAM



In transactions at increasing distances from the origin, the intertwined problems of coordination, division, and defection are more major. The capacity of transaction resources to sustain cooperation becomes problematic. All else equal, the farther any transaction lies from the origin, the greater the transaction resources required for contracting. Cooperation eventually must fail owing to insufficient or excessively costly transaction resources available to the principal parties. The points in the transaction space at which these failures occur define a cost surface that we term the *private transaction resource frontier*. It is convex to the origin because combinations of the three problems draw upon endogenous transaction resources more than any one problem alone.

A transaction at point A is one where the parties can resolve the problem on their own. The easy example of this would include interactions between industry representatives and agencies about requirements. As transactions become more challenging, such as at point B, outside resources must be brought to bear. The example would include cases where an offeror has participated in the source selection process, is not awarded the contract, finds the explanation at the debriefing to be unsatisfactory, and files a protest, which brings GAO or COFC into the transaction as a third party.

Even third party resources can be exhausted at some point, as illustrated by transactions at point C. Here, the parties expend considerable resources and the problem persists, perhaps for years, without resolution acceptable to the parties. In DOD acquisition history, one finds examples in major contracts cancelled by the Secretary of Defense or the KC-Tanker.

In a normative sense, these concepts have been with us since the founding of the Republic in the models for bureaucracy espoused by Thomas Jefferson, James Madison, and Alexander Hamilton (Stillman 1996, pp. 360-366). Jefferson envisioned a decentralized government of technicians with narrow discretion to pursue the public interest; evidently, he feared the costs of solving coordination problems and sought to promote individual liberty through public accountability of government decision-makers. Madison envisioned checks and balances in a government of brokers; evidently, he feared the costs of solving division problems and sought to promote social stability by balancing interest groups. Hamilton envisioned a government of high status professionals with broad discretion; evidently, he feared the cost of solving the defection problem among individuals and sought to promote the national interest through a strong central government focused on organizational efficacy. Public administrators, including those in the Department of Defense and its contracting agencies, and elected officials manage the tensions among these three problems every day.

In a positive sense, this analysis yields several generalizations and hypotheses. First, as uncertainty increases, exhausting transaction resources more quickly, the likelihood of errors and, hence, bid protests, increases. In general, factors that stress endogenous resources as they increase include:

- Number of parties involved in the decision;
- Heterogeneity of the parties' interests (multiple missions or services);
- Level of performance risk (lower in production than design);
- Cost of measuring performance (lower with products than services);
- Tolerance for risk (availability of alternatives increases tolerance);
- Workforce instability (turnover); and
- Contract duration.

Second, gathering information to safeguard against the risk of incoordination tends to be less costly than gathering information to safeguard against the risk of unfair division, which is less costly than gathering information to safeguard against the risk of nonperformance. Specifying requirements and searching the market for suppliers

arguably entails lower information cost and, hence, lower risk of error than translating requirements into evaluation criteria, which in turn appears to entail lower information cost and risk of error than applying the criteria to proposals. The information costs and decision difficulty facing a contracting agency increase through the stages, increasing the likelihood of errors and bid protests.

Third, the objective in designing a source selection process should be to facilitate cooperation among the parties by minimizing the sum of the costs of uncertainty (error) and the costs of avoiding it (see also Calabresi and Melamed 1972). If the decision that accomplishes this is not obvious, then the fallback is to identify the party in the best position to minimize the sum of the costs of uncertainty and the costs of avoiding it. It could be a manager using management tools to design the source selection. Splitting authority and responsibility for 1) specifying requirements, 2) translating requirements into evaluation criteria, and 3) applying those criteria across several offices is an *ex ante* structural safeguard, so to speak, that allows an agency to exploit the benefits of people specializing in each activity while sequencing the risks. Actions like these come at some cost (Vining and Weimer 1999). Allowing offerers to protest after the first stage or after award is an *ex post* safeguard. The optimization principle remains: minimize the sum of the costs of error and of its avoidance.

Management practices, dispute systems design, and conflict management

Management practices balance the risks of incoordination, unfairness, and defection. By “management practices” we refer to the elements of a model of organizations frequently employed to conduct operational audits of efficiency and effectiveness by the GAO (Herbert 1979, p. 123). In this model, management systems consist of five practices:

- ◆ Creating and following an organizational strategy and mission;
- ◆ Designing and implementing a structure of authority and responsibility to accomplish the strategy;
- ◆ Selecting personnel of quality and quantity commensurate with the authority and responsibility assigned to them;
- ◆ Crafting policies and procedures for personnel to execute; and
- ◆ Monitoring and accounting for levels of activity to assure that the policies and procedures are carried out in accord with the organizational strategy and mission.

More complicated models of a management system exist, such as McKinsey’s 7 S: strategy, structure, systems, shared values, skill, style, and staff (Peters and Waterman, 2004), but we opt for parsimony. We treat these five features as managerial choice variables: managers choose their strategy; the structure of authority, responsibility, and information flow for accomplishing it; their personnel policies and the people who to accept the authority and responsibilities; the operating policies; and the monitoring mechanism as well as their responses to the information it generates.

Every managerial choice influences the configuration of individual transactions and their pattern. By “configuration” we refer to five elements:

- Whether alternative agreements differ in terms of who gets what, or, as is more likely within organizations, whether alternative agreements create mutual benefits;
- Interests: the motivations behind the parties’ positions on particular issues;
- Alternatives to agreement: each party’s options elsewhere;
- Available negotiating strategies and tactics: choices whose effectiveness is contingent upon the environment of the negotiation; and
- Procedural constraints: limitations on the processes by which the parties can reach agreements.

Each person brings into every transaction a set of positions on the issues being discussed. Which issues matter and the positions people take on them are motivated by their underlying, individual interests and priorities. Their interests and priorities result from their private and professional affiliations and objectives, as well as their functional responsibilities. Any transaction will have a range of acceptable outcomes. The choice among them will be a consequence of each individual’s resources, including information, positional authority, and financial assets; incentives in their environment; and the tactics they employ.

Management practices frame transactions both within the organization and between the organization and outside stakeholders, mitigating some conflicts and exacerbating others. Managers want to secure gains—in the procurement world, efficiency and best value; distribute them fairly—in the procurement world, equal access; and promote compliance—in the procurement world, deter malfeasance, corruption, and poor performance (Greenstein 1993). The economics of organizations helps to explain the choices managers make (Posner 2010), choices that contribute to persistent performance differences across organizations (Gibbons 2009). A properly aligned management system minimizes errors and conflicts, directing conflicts to the parties in the best position to resolve them. Misaligned features generate friction and errors.

The three key ideas include the complementarity of the choice variables, the non-convexity in the set of available choices, and the non-concavity in the relationship between choice and performance (Roberts 2004, ch. 2). Complementarity has to do with interactions among the variables affecting performance, giving rise to coherence in design. For complements, making one choice increases returns to the other: splitting decision-making authority between finance and engineering departments generates increasing returns to personnel policies that recruit financial analysts and engineers with skills matched to distinct departmental mandates. For substitutes, making one choice reduces the attractiveness of the other: if introducing performance pay gives incentives for good behavior, then the value of monitoring to enforce the good behavior declines; given that monitoring is costly, less should be done. With complementarity, the whole is greater than the sum of its parts.

Convexity means that if two options are available, then any intermediate choice is available. Concavity means that the impact on performance of successive increments in the choice is decreasing, and if two distinct choices lead to the same performance, then any intermediate choice leads to a higher level of performance. Together, they mean that multiple coherent designs can exist but that there is a best way to do things. “Best” means that the features of the management control system fit, maximizing complementarity to maximize performance.

Of course, indivisibilities undermine the concavity assumption: one person’s authority over a decision is indivisible; authority either rests with headquarters or it is decentralized. But this helps us understand seemingly irrational behavior, like organizations that are constantly shifting between coherent designs. Another implication is that fiddling with one feature, like centralizing or decentralizing authority, can undermine performance; fiddling with one feature means fiddling with the others to assure a continuing best fit. If management decentralizes decision-making without adjusting its monitoring and accounting systems, for example, it heightens the risk of underperforming. If management bundles its management practices appropriately, the synergy increases performance (Gibbons 2009, pp. 24-25).

To recapitulate: the five features comprising a management system are choice variables. When these choices are complementary and the components of the management system are aligned, management practices promote productive negotiations. Parties communicate openly and share information about their real needs and priorities. They identify all of the issues relevant to the organization’s strategy and cooperate to create maximum value. *Ceteris paribus*, the opportunity for individual gains from coordinated action increases relative to the opportunity for individuals pursuing their own ends at the expense of their joint interest. The potential for unproductive conflict—distributive conflict over who gets what and over guarding against defections—declines. People also tend to avoid taking risks to protect a certain gain; they will take more risk to avoid a certain loss, which means they will be willing to make concessions to reach agreements and to follow through on them when management practices align. In source selection, this minimizes the potential for unproductive conflicts and the likelihood of protestable errors. The amount of transaction resources expended on solving coordination problems will go farther than the same amount expended on solving defection problems.

When misaligned, management practices generate unproductive negotiations. Parties withhold relevant information and pursue priorities and issues that are inconsistent with the agency’s strategy. Parties neglect relevant issues and fail to follow through on their commitments. Disconnects foretell losses and losses encourage risk-taking. In source selection, this increases the likelihood of unproductive conflicts and protestable errors. As a DOD contracting official put it, “protests happen because of organizational dysfunction.” Current and former agency officials agree with industry executives: what agencies do to create good source selection processes also mitigates protests.

In the source selection process, conflicts that cannot be resolved by negotiations involving the principal parties at the agency level because they have insufficient transaction resources will become bid protests. GAO, as a third party intervener that expands the transaction resource frontier, can set a standard of reasonableness related to the materiality of any errors to the final decision. That minimizes, but will not eliminate, errors and, hence, bid protests. Sustaining protests where they are material sends a signal to agencies to adjust their management practices, that is, the fit between its strategy, structure, personnel, policies, and monitoring.

One premise of dispute systems design is that building a conflict management system improves organizational performance by helping employees resolve destructive conflicts and, thus, improves the climate and productivity through constructive conflict (Conbere 2001, p. 233). Destructive conflict redistributes value, merely incurring transaction costs. Constructive conflicts generate solutions to organizational problems. They can capture opportunities or mitigate threats to the organization's strategy; they add value net of their transaction costs. However, the need to build a conflict management system, such as the bid protest process at GAO and COFC, may be symptomatic of organizational failure in the source selection process.

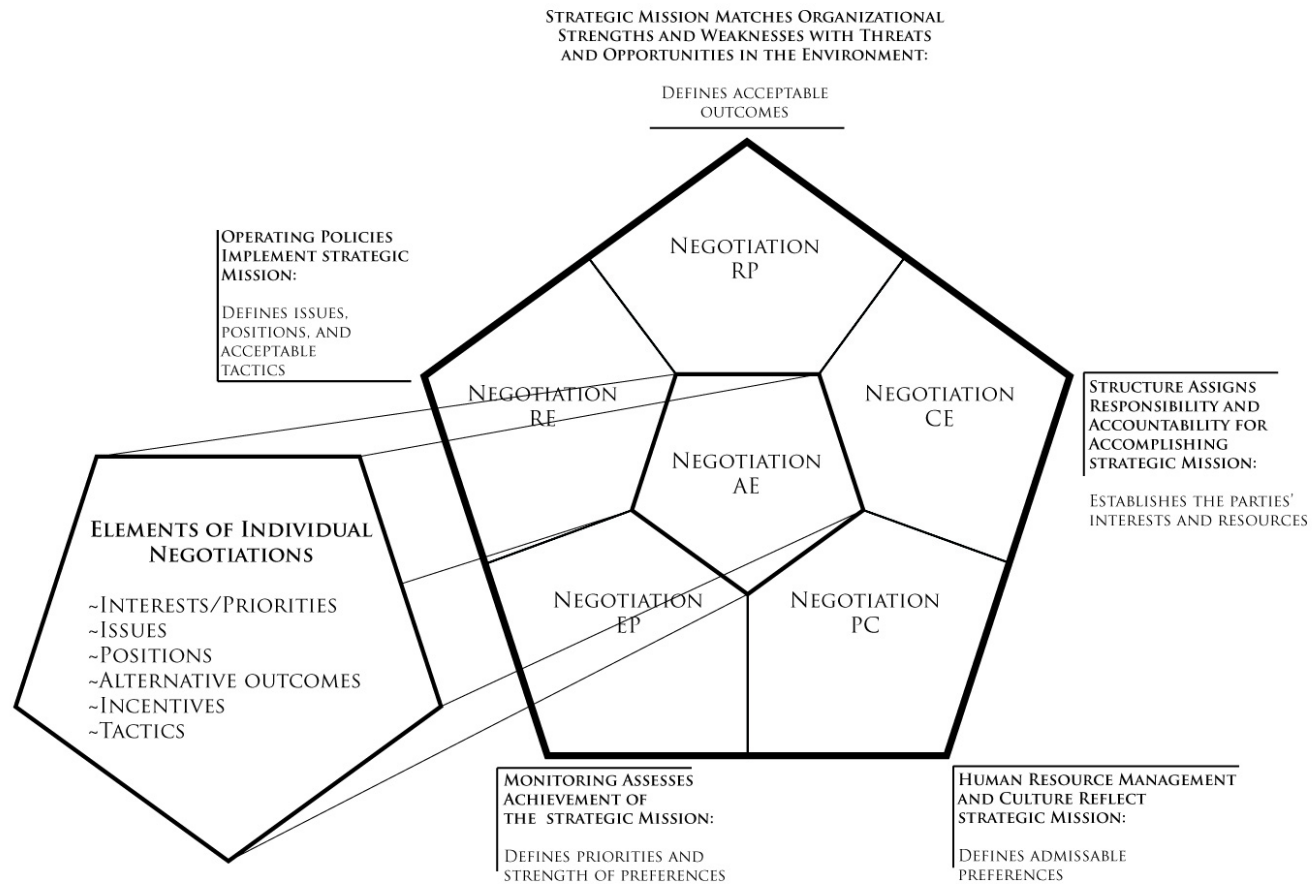
A second premise is that a conflict management system, suitably adapted, will work in almost any organization. The question that motivates much of the dispute systems design literature—whether to change the culture of organizations, like DOD contracting agencies, to accept a conflict management system—fails to address a more fundamental question that follows from transaction resource theory: what changes in managerial practices will allow employees to use their endogenous resources to manage conflict more efficiently and effectively without intervention by third party interveners.

With respect to source selections, DOD, contracting agencies, contracting officers, evaluation boards, source selection authorities, and project managers: all are part of a system for managing conflicts. The GAO and COFC are third party interveners. We can mitigate bid protests, or, more significantly, the expenses and delays in performance associated with them, not only by involving third parties, but also by managing the configuration and patterns of conflicts that arise within the source selection system.

To help understand our theoretical approach, see Figure 1. Here, we define a contracting agency by the five features of its management system, which results

FIGURE 1

AGENCY MANAGEMENT SYSTEM
INFLUENCES NESTS OF LINKED INTERNAL NEGOTIATIONS



A = SOURCE SELECTION AUTHORITY E = EVALUATION BOARD P = PROGRAM MANAGER C = CONTRACTING OFFICER R = REQUIREMENTS GROUP

conveniently in the outline of a pentagon. Within it lie nests of linked negotiations, all depicted as pentagons. The members of a requirements group, typically from different organizational and professional backgrounds, negotiate with each other. They also negotiate with the contracting officer. Members of evaluation boards negotiate with each other. They also negotiate with the contracting officer. And so on. Since the buck effectively starts and stops with the Source Selection Authority, we put it in the center to indicate its primacy in decision-making.

The agency's management system frames these internal negotiations, summarized in Table 1. An agency's mission establishes what it wants to do, what it does not want to do, and why it's worth it. Given that the environment is replete with opportunities and threats, and organizations have scarce and diverse resources, the agency's strategy defines how it will accomplish its mission. Whether dictated from the top down or rolled up from the bottom, strategy and mission match the organization's capabilities with its opportunities and threats. It coordinates expectations within an organization, creating common interests among employees about what matters and, thereby, reduces the range of acceptable alternatives and their choices. This necessarily establishes the organization's priorities and the criteria for acceptable outcomes, constraining the agreements that can arise from the nest of individual negotiations. A risk of misalignment is misdirecting the organization's resources from real opportunities and threats.

At a basic level, the strategic decision for DOD to rely upon the private sector alters the configuration of conflict. It requires contracting agencies to demonstrate that their needs cannot be met in the market, effectively eliminating one potential outcome to a negotiation about production untenable. When Congress enacts policies that grant private firms the right to be treated fairly in the source selection process, it effectively defines the issues that firms and contracting agencies will debate.

The agency's structure matches authority with responsibility for making decisions and requisite resources to execute the strategy to achieve the mission. Through differentiation and specialization, functional or otherwise, the structure creates interdependence, which is the precondition for negotiation. It defines who may participate in making decisions, their interests, the issues they care about, and their access to resources such as authority, information, budget, and personnel. Nothing is more important to successfully resolving conflicts than identifying who may participate in resolving them (Lax and Sebenius 2006). Different participants generate different outcomes. The risks of misalignment include, for example, conflicts among parties over who has the authority and responsibility to decide, conflicts rooted not in a difference of interests but in parties having different information or capacities to make the decision, or conflicts arising from conflicting policies.

Contracting agencies structure their operations differently. In one, a group of professionals has dedicated responsibility for setting requirements and writing evaluation criteria. Another forms temporary teams of professionals drawn from its various operating units. The different structures entail different resources and engage people with

Table 1
MANAGEMENT PRACTICES AND CONFLICT MANAGEMENT

MANAGEMENT PRACTICE			IMPACT ON LINKED NEGOTIATIONS	
ELEMENT	DEFINES	TO MATCH	FRAMES CONFLICT BY	RISKING
Strategy	Priorities	Opportunities with the organization's capabilities	Targeting alternatives Coordinating expectations and interests	Missed opportunities
Structure	Paths for making decisions	Discretionary authority with responsibilities (Expertise)	Precluding alternatives and affected parties from decisions Assigning resources, interests	Inconsistent decisions
Human Resource Management	Functional capabilities	Responsibilities with employee skills	Delimiting interests, preferences, and positions	Judgment errors
Operating Policies and Procedures	Responses to operating variances	Employee decisions with conditions	Defining acceptable agreements Arbitrating conflicts	Inequity Inefficiency
Monitoring System	Information to support decision-making	Employee performance with organizational expectations	Weighting interests Delimiting tactics	Perverse incentives Biased information

different knowledge, skills, and aptitudes who likely will interact differently with each other and with potential contractors.

Human resource management in an organization matches the knowledge, skills, and aptitudes of individuals with the responsibilities assigned to their positions in the structure. Different responsibilities require different capabilities, experience, and education. Organizations select people, train them, and create rewards and sanctions to align individual self-interests with the organization's interests. These choices define the functional capabilities in the organization, what its employees can do. Human resource practices frame the configuration of individual conflicts through the personalities, preferences, and intellectual resources that become part of and are developed within the organization. A risk of misalignment in these practices is that parties do not have the knowledge, skills, and aptitudes to make the judgments required of them.

The way contracting commands identify, monitor, and reward employees with compensation and promotion differs. In some agencies, employee personnel files are updated to note that they participated in a source selection, and they could not easily advance in the agency unless they had. In others, no note is taken of their participation.

An organization's operating policies and procedures implement its mission and strategy, instructing employees about what to do. When operating conditions deviate from normal, which they invariably will, these instructions inform and set boundaries on employee decisions, defining what is acceptable and what is not. Policies and procedures match employee activities with operating variances. When managers choose policies, they influence the configuration of individual conflicts by establishing the issues that are negotiable, the range of permissible positions, acceptable tactics, and the resources that employees may apply to resolve conflicts. The risk of misaligned operating policies is that parties make decisions inappropriate for the problems presented to them, resulting in inefficient and inequitable outcomes.

For example, if the military's supply chain was entirely in-house, meaning that the government owned and operated the means to design, produce, and deliver products and services, conflicts would occur but bid protests would not. Consider a decision to provide a new helicopter for use in the field. Transport planes will deliver the helicopters to wherever they are needed. The military has multiple transport planes that differ in the size of the openings for loading cargo. The helicopters can be designed with folding rotors. With rotors designed one way, the helicopters fit the transport plane with the largest opening. Designed another, more expensive way, the rotors can fit into more types of transport planes. This has implications not only for a tradeoff between price and life-cycle operating cost, but also for where the helicopters should be based and who will maintain them, which impacts the units that operate them and the units that maintain them within the same military service. As a matter of strategy, if the military produced the helicopters internally, it would generate a pattern of conflict resolved largely internally, except perhaps for decisions with implications for job creation that attracts congressional interest.

Suppose instead that multiple private companies can bid on the contract to produce the helicopters. Each wants to leverage its existing product line to reap both additional value from its intellectual capital and economies of scale from its production facilities. If the requirements for the helicopter are specified so as to favor its ability to be transported by both types of transport planes, a vendor who builds a model that can only fit in the larger plane might protest that the requirements favor its competitor(s). If the requirements are specified so the helicopter can be transported only in the larger plane, a company that builds a helicopter capable of fitting into either plane can protest on the same grounds. The transparency of the process and the governing rules set the stage for a protest.

Finally, an organization monitors its performance toward achieving its mission and executing its strategy. Accounting, budgets, administrative controls, activity reports and audits channel information to decision-makers. The monitoring system should ensure that individuals have the information they require to make decisions for which they are responsible, and match their performance with organizational expectations. Since people can only make decisions based on the information available to them, the monitoring system frames the way parties perceive conflicts and their alternatives. By defining and quantifying behavior, a manager's choice of monitoring and information system influences the interests that parties express in conflicts. Because individuals respond to the measures used to assess their performance, the monitoring system will constrain the priorities that individuals bring into their relationships and the strength of their preferences over potential outcomes. The risk of misaligned monitoring is that people's behavior responds to the ways in which their performance is measured, and imperfect measures create perverse incentives (cf. Thompson 1993).

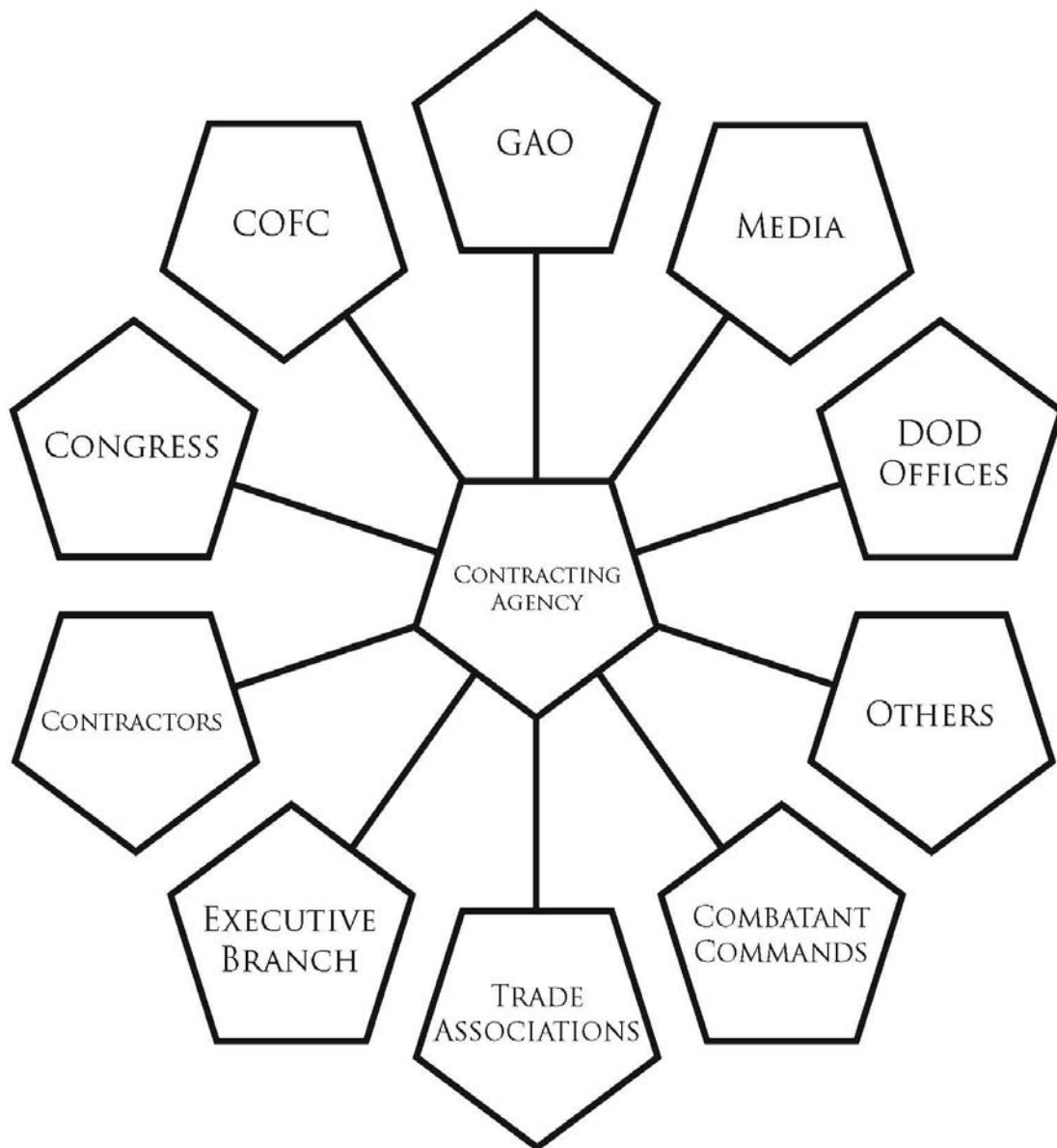
An agency's management system not only influences the resolution of internal conflicts, it also influences the way in which its employees interact with stakeholders from external organizations. In the source selection stage of acquiring a complex product, conflict occurs within DOD among those setting requirements, acquirers, comptrollers, and users, even as outside parties try to influence the outcomes of these conflicts.⁴ Figure 2 highlights organizations in the environment of every contracting agency. All do not have the same significance for every agency; some agencies no doubt interact with external organizations that do not appear in the figure.

A simple example in the source selection process could be the limits placed by statutes and DOD policies on an acquiring officer's discretion. An acquiring officer can override the rules but the burden of proof is on the officer to justify it. An acquisition officer can negotiate with a sole source provider and use factors other than price but he or she must prove on the record that this is justified. Doing so tips the officer's hand in negotiations with the sole source (Thompson and Jones 1994).

⁴ In the building stage, conflict shifts to the relationship between the agency and the producer, especially where specialized investments are required; the conflicts have more to do with contracting and monitoring, depending upon the cost of measuring performance (Brown, Potoski, and Van Slyke 2008).

FIGURE 2

AGENCY MANAGEMENT SYSTEM
INFLUENCES NESTS OF LINKED EXTERNAL NEGOTIATIONS



Another example involves contracting agencies and companies that have different risk profiles, which can underlie their conflicts and contribute to protests. A contracting agency official made an analogy between buying a weapon and buying a glove. Two companies produce gloves and sell them through retailers by convincing the consumer that its glove fits best; the consumer should live with a tighter glove or looser glove because that's what the producer produces. Offerors will say that their products are produced custom for military use, but they are planning to diversify their product lines, modifying a product to fit and will try to convince the military to take their product because it fits "best." But the military doesn't want "best" fit; the military is dealing with matters of life and death and it wants a "fit." It will not accept as much performance risk as retail consumers and the offerors.

External organizations are no more monolithic than the agencies themselves (Schooner, Gordon, and Clark 2008). In its interactions with Congress, an agency can interact with individual members of the House and Senate or their staffs, and members of different committees, such as the Armed Services Committees and the Appropriations Committees' Defense Subcommittees, which have different authority and interests. Different vendors have different motivations: maximizing profit, organizational survival, growth in sales and employment, security in sales and employment, freedom from harassment, desire for public approbation, desire to contribute to national defense, desire to advance science and technology, etc. (Scherer 1964). Multiple interests create opportunities for joint gains, if the contracting process allows contracting officials the latitude to serve the government's interests while serving the contractor's interests.

Government contracting officers sit at the nexus of two different contracting systems (Cooper 2003, pp. 12-13). Contracts involving government result from a vertical process that produces the decision to contract, to appropriate funds, and to hold people accountable within an authority-based process derived from the Constitution. Public laws give authority to the contracting agent. Contracts in business operate horizontally, based less on authority than on negotiations and rules of relationships mutually agreed upon. In this context, where a business perceives red tape, government decision-makers perceive accountability.

IV. The pathology of bid protests

Transaction cost theory leads us to focus on contracting problems clouded by the cost of information, especially the division problem, and the management practices that influence solutions to them. While theory informs the questions we ask, the interviews we conducted also inform our analysis of GAO's bid-protest decisions. Our findings could be put down to everyday causal intuition. Indeed, a critic might say that this effort lacks the full quality of scientific reasoning. Practical causal inferences are really only as good as the substantive models that underlie them. However, conventional wisdom revealed in our interviews colors perceptions and, given the cost of information, perceptions become the basis upon which people in the community make decisions, including the decision to protest. We begin by examining seven items of conventional

wisdom, then test four hypotheses, and conclude by analyzing the impact of management practices.

Conventional wisdom and patterns in bid-protest decisions

First, DOD's increased reliance on commercial markets increases opportunities for bid protests. However, when DOD increases the bundling of contracts, putting several smaller activities into a bigger contract, fewer smaller contracts implies fewer opportunities to protest. Indefinite delivery-indefinite quantity (IDIQ) contracts also reduce the number of protests.⁵ We take these statements as givens.

Second, the size of the rejected offeror plays a role in its decision to protest. An agency contracting official expressed a sentiment echoed by others:

Mom and pop companies are protesting. They don't understand the system and how it works, so they protest when they lose. The big guys are juggling a portfolio of projects, so protesting is a business decision. Depending on what other contracts they've won, protesting a particular project might not make sense.

Most protests involve contracts with comparatively small value—under \$100 million—where protestors are relatively small—fewer than 500 employees. As Charts 1 and 2 reveal, most protests are by small companies protesting awards to other small companies.

⁵ Suppose ten companies compete and six receive awards. The contract has a nominal value of \$50,000 with \$500 million dollars of task orders. Until 2008, IDIQ contracts could not be protested; GAO did not have jurisdiction. Now, a company can file a protest if a task order exceeds \$10 million. We can see when IDIQ contracts are protested, but not task order protests. We cannot answer the question of who among the six awardees receives the task orders. For task orders below \$10 million, a company not awarded a task order cannot go to either COFC or GAO. Still, those who win IDIQ contracts likely know they will receive repeated task orders, a comment validated by a contracting agency official.

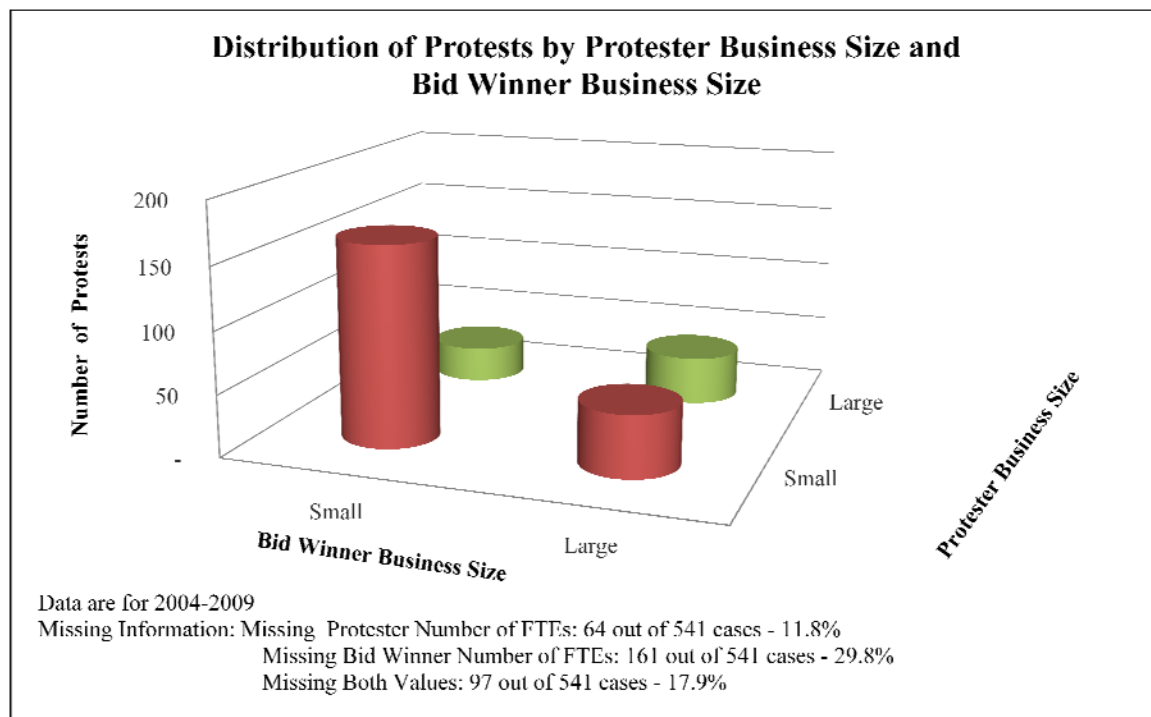


Chart 1

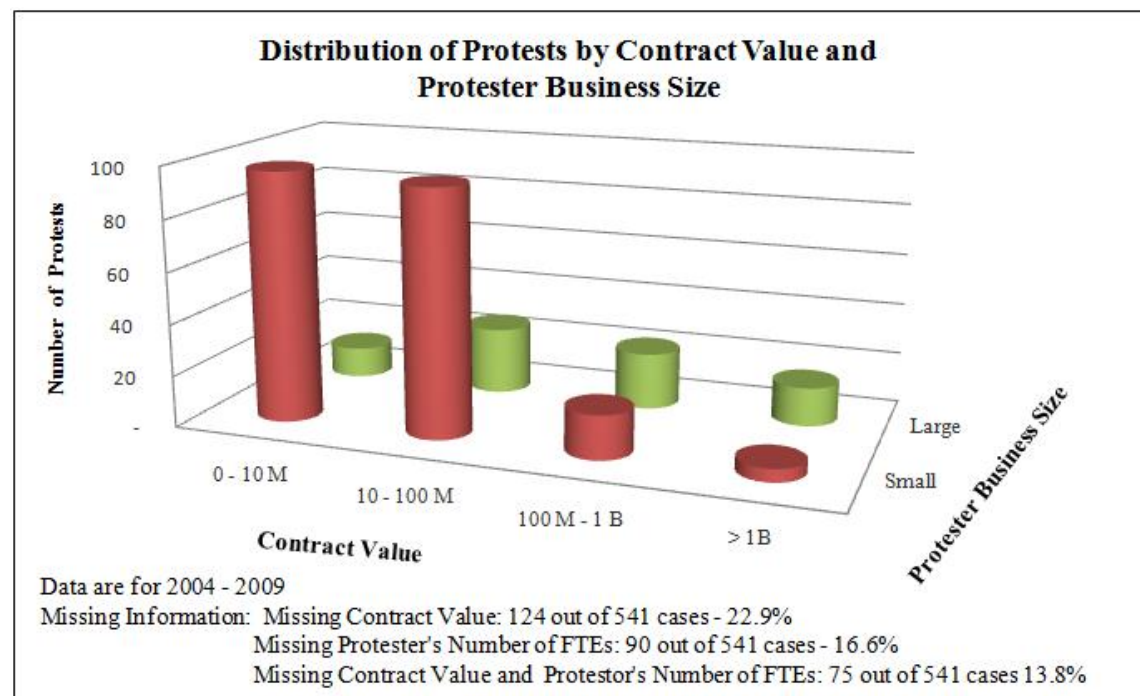


Chart 2

Federal Procurement Data Systems (FPDS) makes information available only about contract actions. We made assumptions about the average number of contract actions per contract to try to understand the overall population of contracts from which protests arise. Chart 3 shows that the average number of contracts per larger company has increased

while it has remained about the same for smaller companies, but the number of protests from larger companies has declined while the number from smaller companies has increased.

This may be because larger companies absorb smaller companies having success in government contracting, although firms that have a tradition of protesting sometimes become subsidiaries of larger companies that do not. Chart 3 is consistent with larger companies being more strategic in their decisions about when to protest, given that they may lose a contract at one agency but are likely to be successful at another, so do not want to anger their “customers.” The data are also consistent with smaller companies fighting harder in an increasingly competitive marketplace for government contracts. This also reflects the response by small companies to the “effectiveness rate,” which combines the rate of sustained bid protests with the rate at which agencies respond to a protestor’s concerns so that the protestor withdraws the protest; at almost 50%, the effectiveness rate encourages protests.

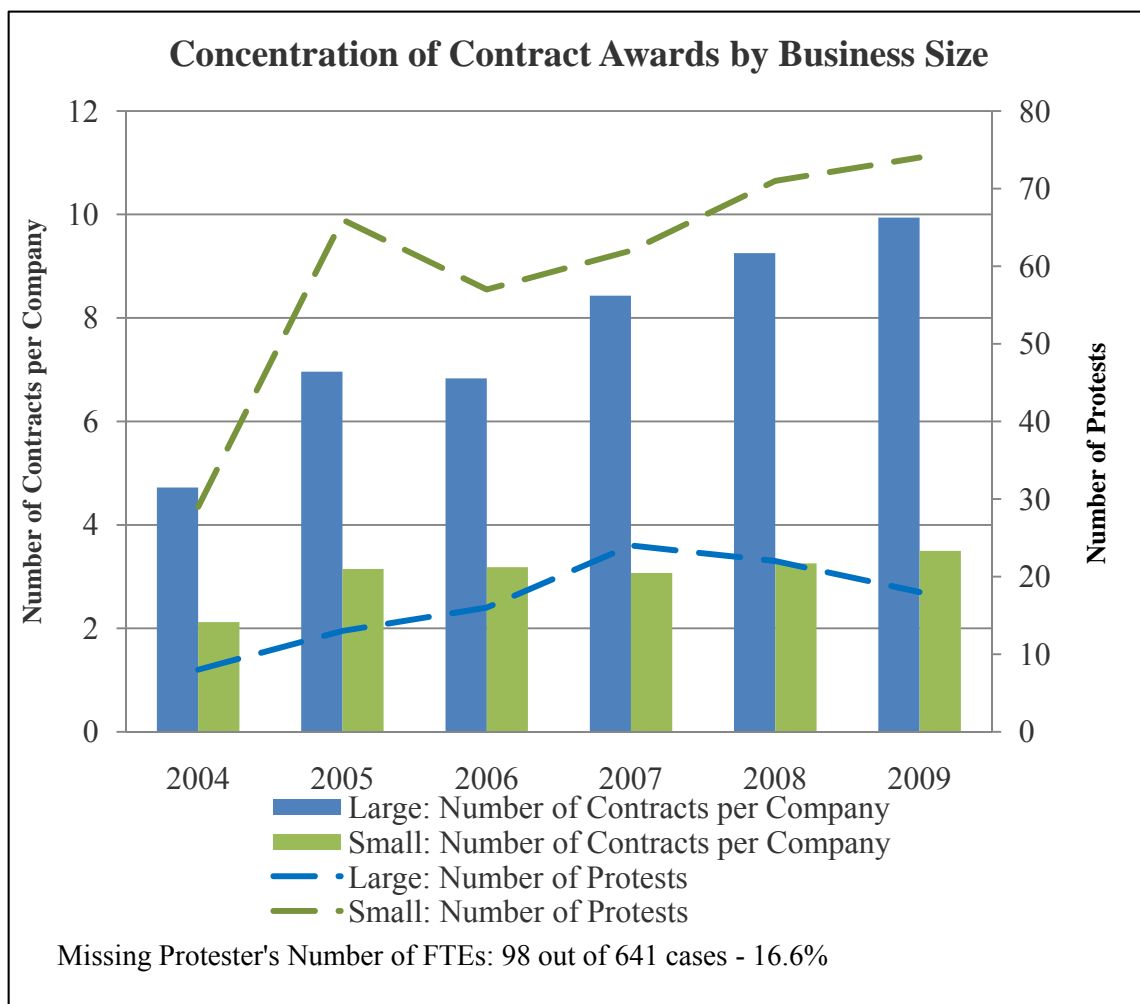


Chart 3

A bid-protest attorney expressed a third piece of conventional wisdom: “Protesting organizations tend to lose to big firms, unless the protestor is a big firm. Medium firms protest medium firms; big firms protest big firms.” In Chart 4, the rate of sustained protests is higher for larger companies than for smaller ones. The absolute number of sustains is not large, but regardless of the value of the contract, larger companies achieve more sustained protests, and the larger the value of the contract, the greater the likelihood that a large company’s protest will be sustained. As Chart 5 shows, large protestors achieve a higher rate of sustained protests, regardless of the size of the winner.

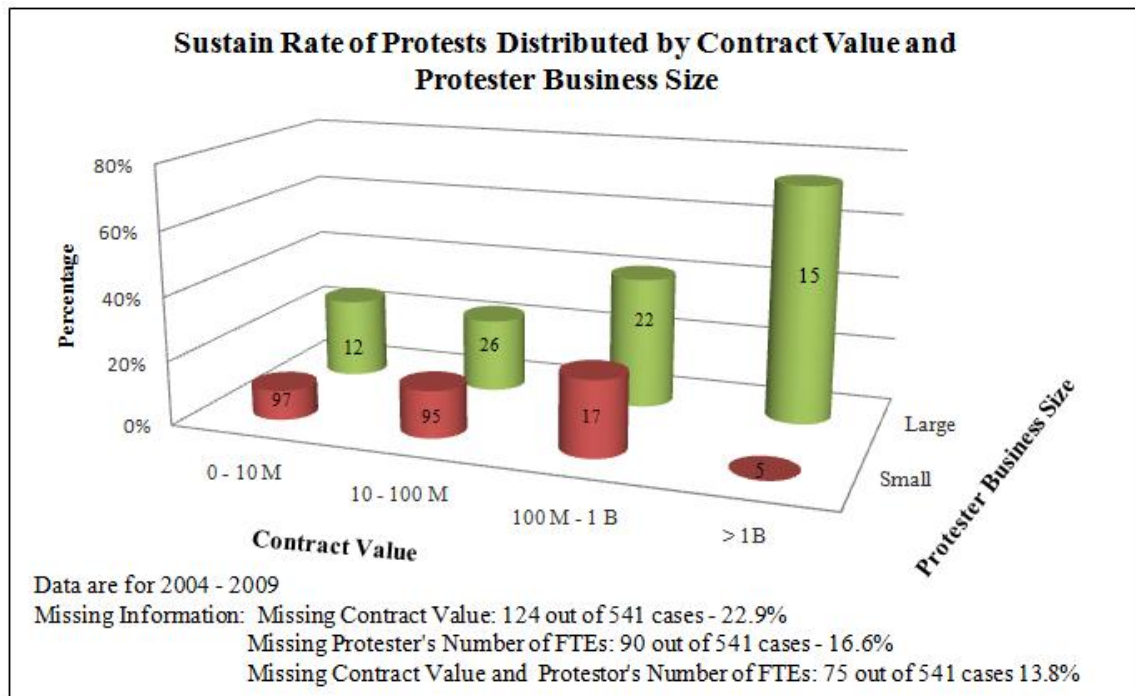


Chart 4

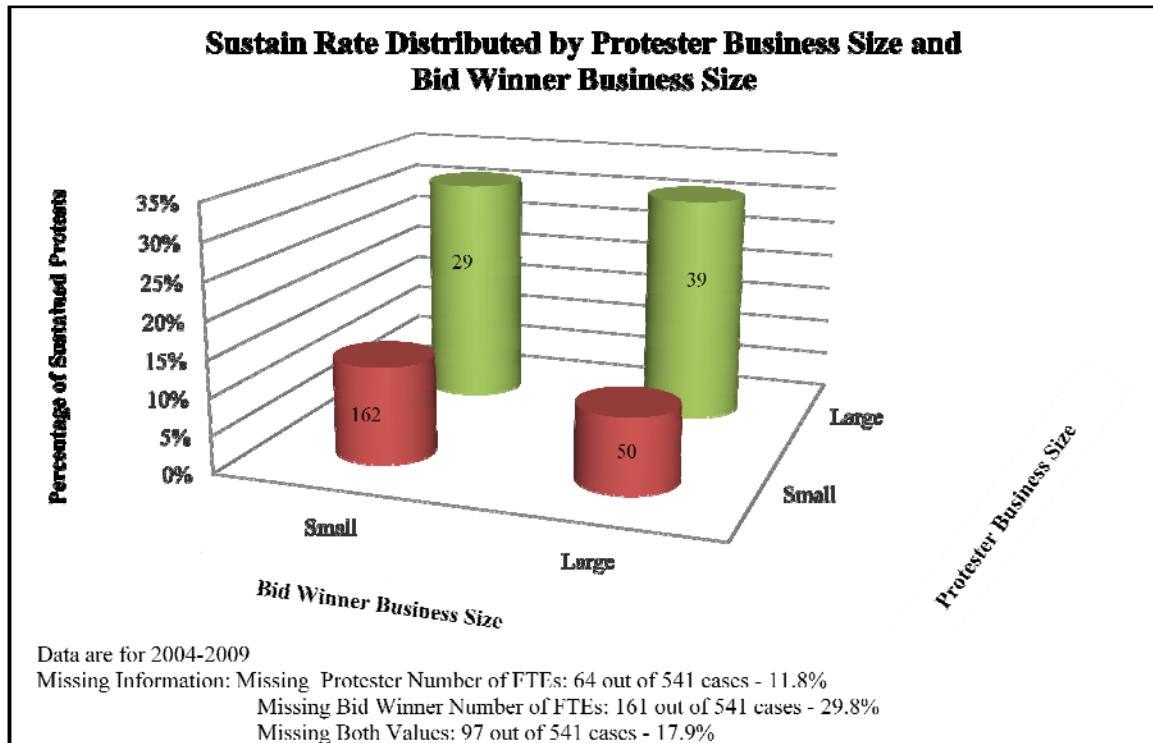


Chart 5

Fourth, under some conditions, protests are inevitable—no matter who wins—and everyone knows it. Contracts with a large dollar value have a big impact on offerors. Indeed, the largest number of protests is from rejected offerors when the total value of the contract exceeds one hundred percent of the companies' annual revenue. See Chart 6.

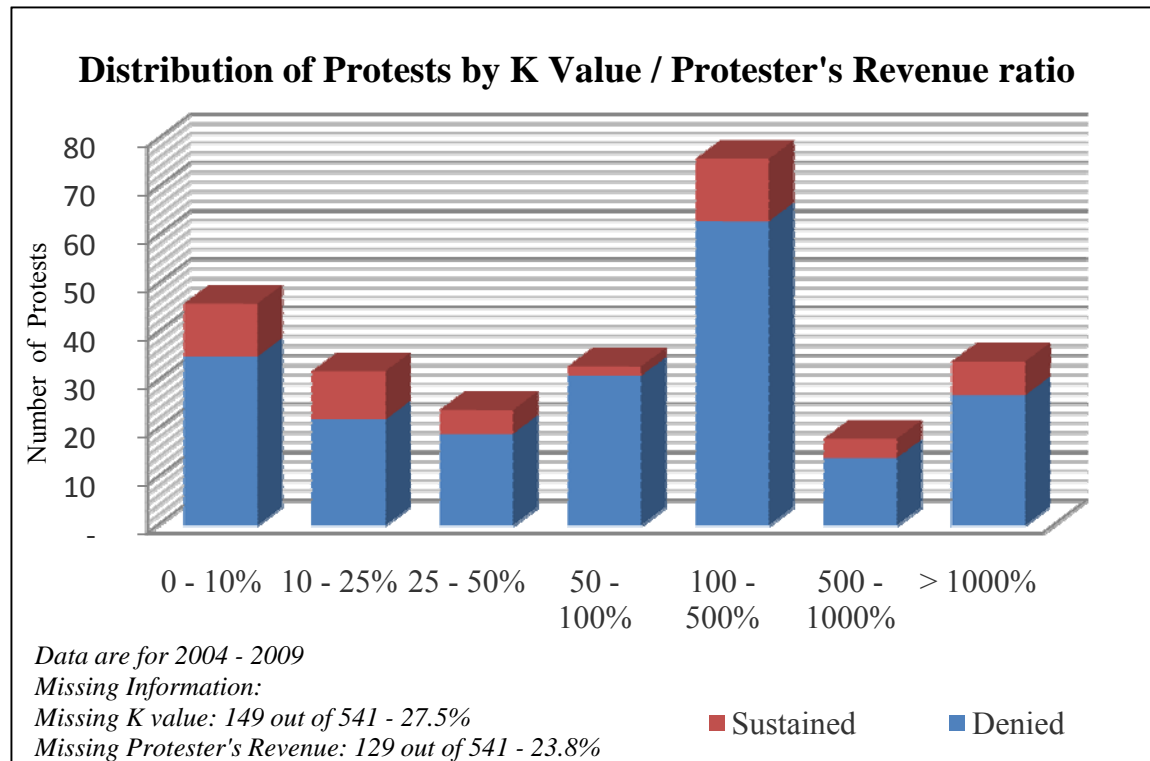


Chart 6

Fifth, protests involving longer contracts are more common than protests involving shorter ones. Chart 7 confirms that. A reason for protesting longer contracts is

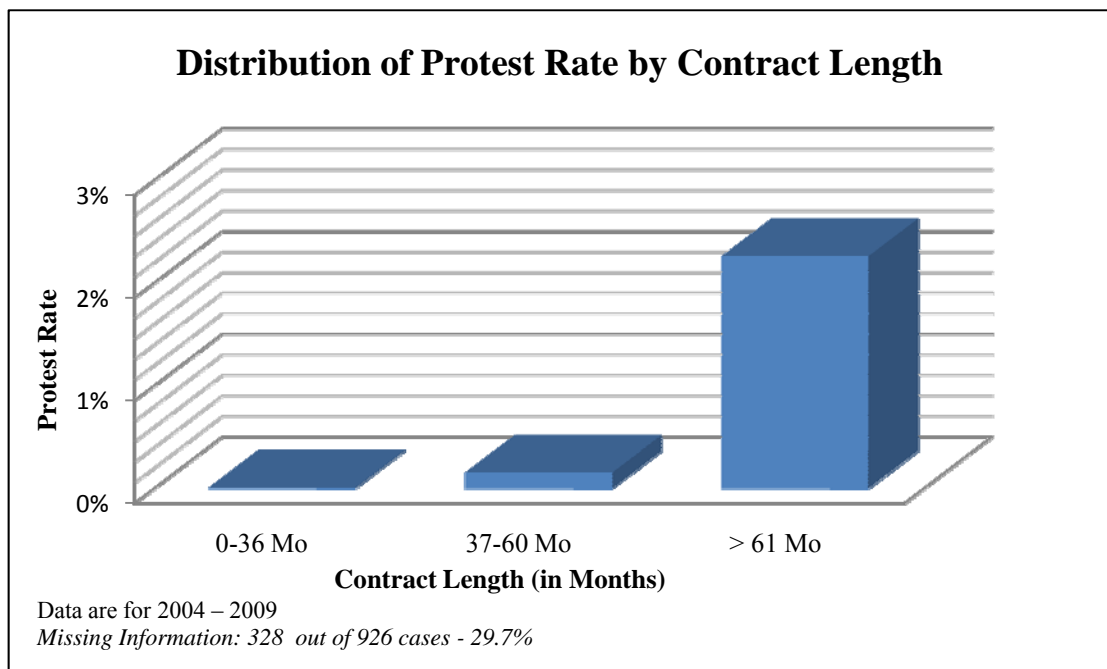


Chart 7

the fear of “lock out.” In a dynamic acknowledged by vendors and bid protest counsel, the disappointed offeror will not be able to participate in the government segment of the market for the product or service, perhaps for a decade. The rejected offeror, especially an incumbent supplier, may find it too costly to mothball people, capital, and other resources awaiting another opportunity to win the business. The contract need not be large for the fear of lock out to encourage a protest if it is delivered in a smaller geographic area where alternative government contracts are not available. From this perspective, the investment of resources in a bid protest, or at least a threat of one, appears to be cost effective.

Sixth, complex requests for proposals (RFPs) make it easy for the agency to trip up, presenting easy targets for bid protest attorneys. Said one, “The agency lists all sort of requirements including some that are very low priority, but they do something wrong on a low priority requirement and it exposes them to a bid protest.” Evaluators might not be trained adequately, so the agency does not do what it told contractors it would do.

We find support for this in the distribution of protests across products and services (see Chart 8). More contracts involve products than services, but more protests involve services than products. As a former agency contracting official, now with a trade association, reported, “...especially for service contracts, it is difficult to do performance monitoring. The agencies focus on design features in service contracts.” In other words,

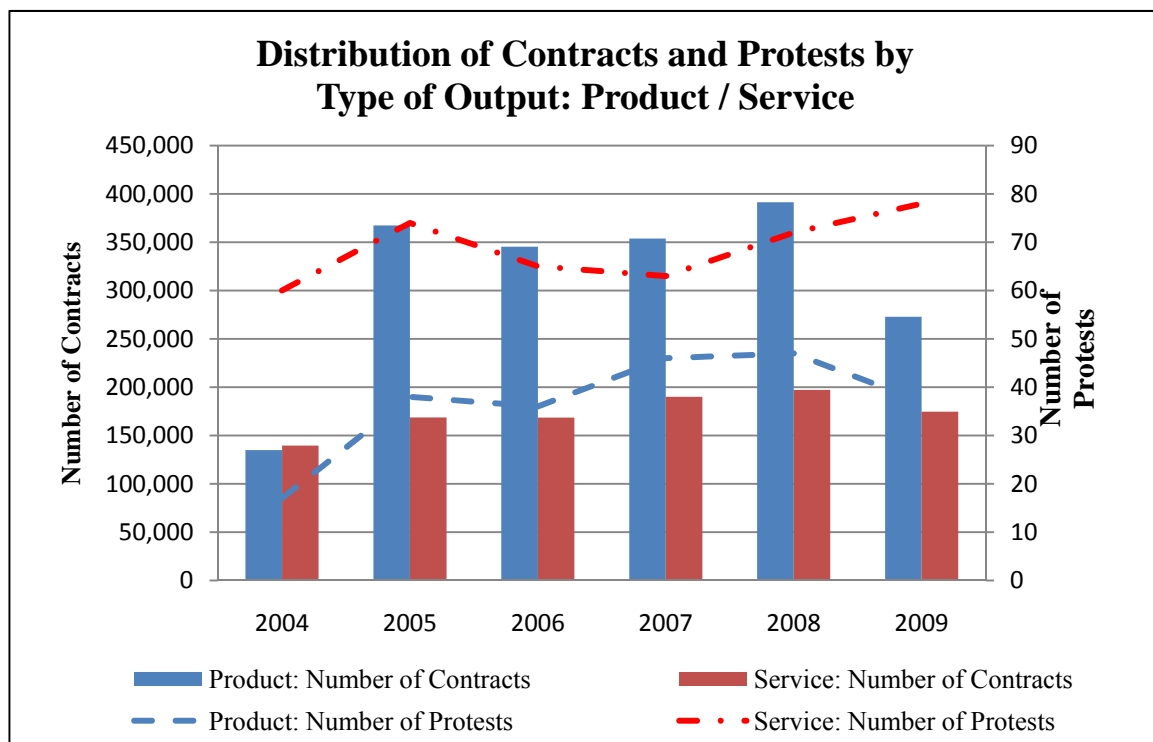


Chart 8

the more difficult it is to define outcomes, the more likely the agency will set input requirements. Because more requirements means more evaluation criteria, the risk of a

sustained protest based on misvaluations increases (Snider and Walkner 2001). Chart 9 shows this, at least through the first half-dozen requirements.

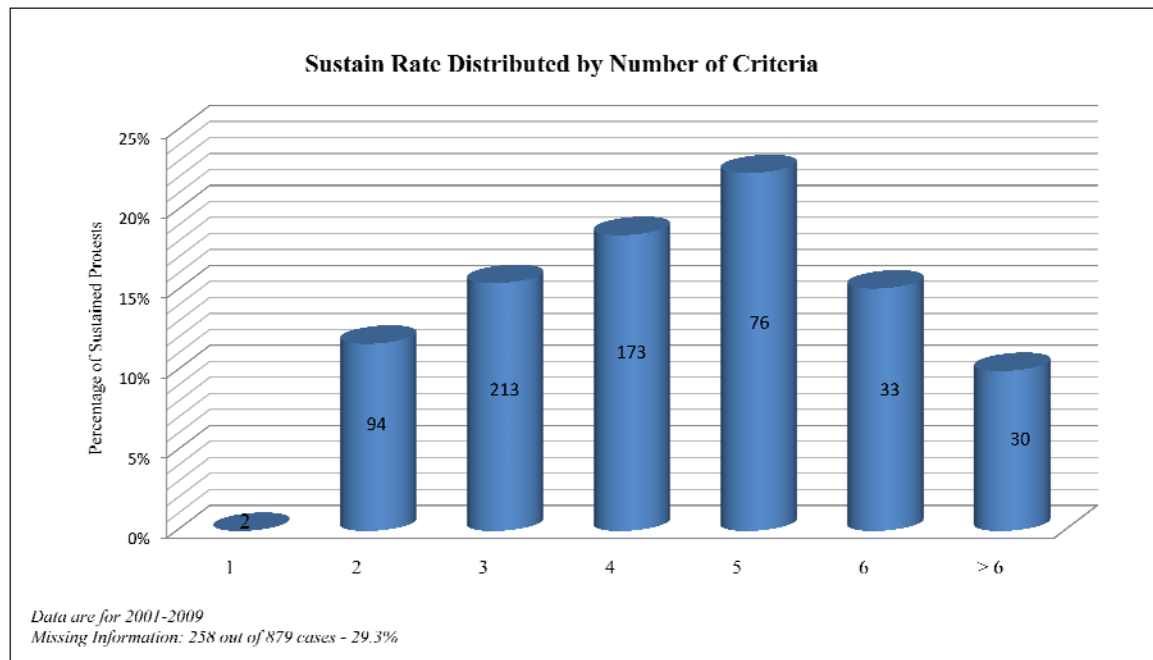


Chart 9

Seventh, GAO strives for consistency in its bid-protest decisions but because it has discretion in the claims it deems to have merit and its process serves more than one purpose, predictable patterns appear that admit strategic behavior by protestors. GAO sees its role not only as resolving disputes but also educating to the acquisition community and promoting competition. Since GAO renders decisions on the basis of claims brought before it, one might expect to find GAO's attention drawn to new categories of claims so that it can educate the community. Anticipating that, protestors file more claims in those categories in the hope of prevailing. Once GAO issues opinions on a category of claims, the number of claims would decline as the acquisition community learns about acceptable behavior. One finds elements of this in the patterns of protests and decisions on matters that entail a considerable degree of agency discretion and measurement difficulty: agency misvaluation, evaluation of offeror past performance, and organizational conflict of interest. See Charts 10, 11, and 12.

Hypotheses and tests

Transaction costs theory suggests several hypotheses about the effects of the bid-protest mechanism on the nature of the division problem and source selection decisions as solutions to it. This mechanism is unique to government; so too is its logic. As a matter of mechanism design, we want to know how it affects the fairness of government contracting decisions. Conventional wisdom contributes to the social norms and context that profoundly influence those decisions and perceptions of them (Homans 1961).

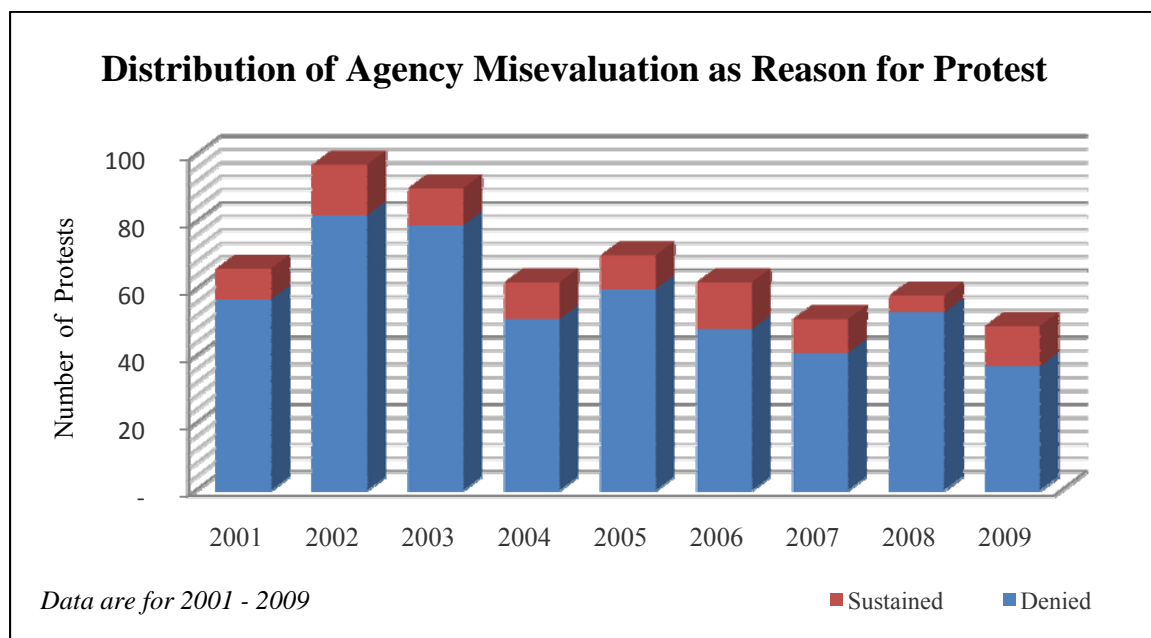


Chart 10

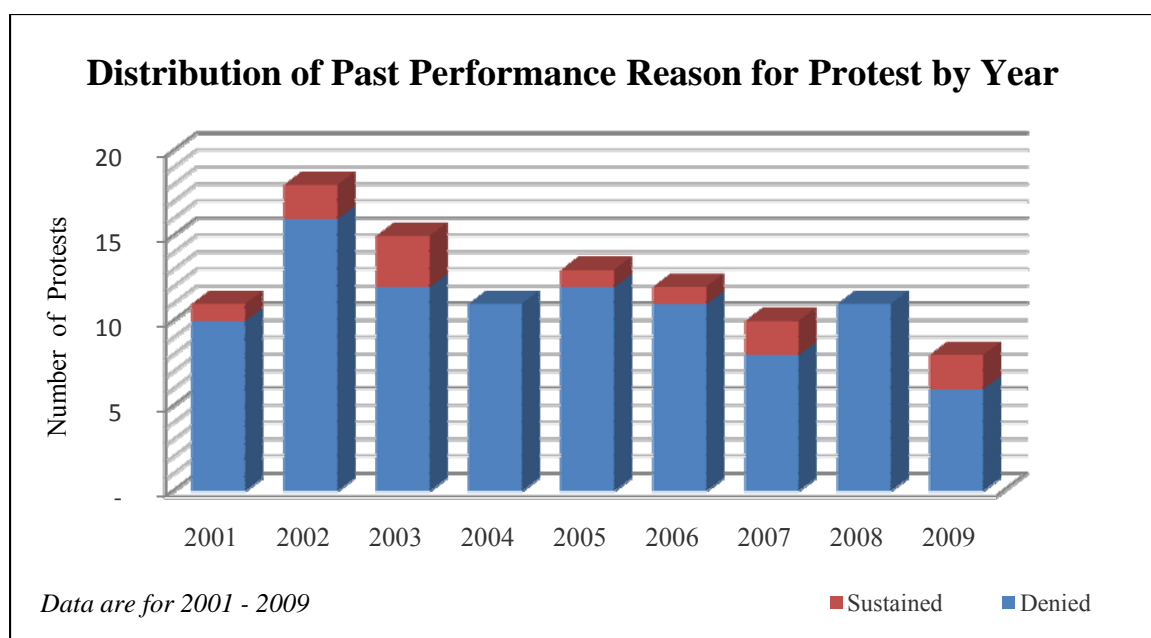


Chart 11

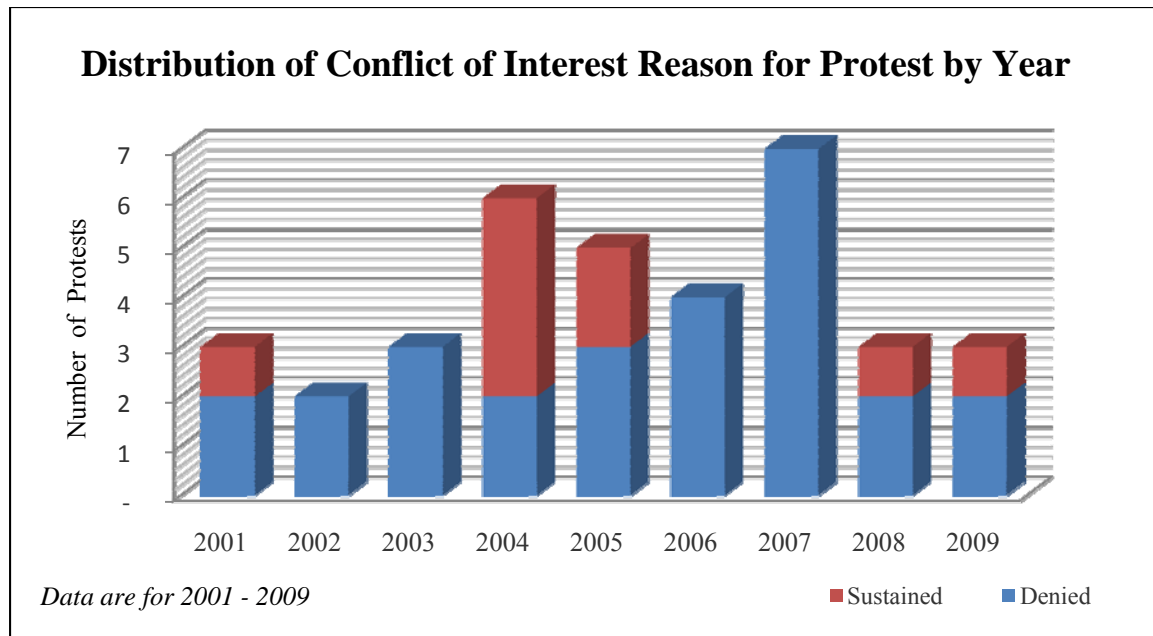


Chart 12

There exists an extensive academic literature on fairness in social relations (Homans 1961; Leventhal 1980; Kahneman, Knetsch, and Thaler 1986; Moorman 1991; Babcock *et al.* 1995). Two basic approaches to fairness feature in this literature, both of which bear upon the bid-protest issue: the procedural and the distributional. Procedural rules are judged in terms of consistency, absence of bias, and equal representation. Distributional rules follow criteria that are relative to the individual's position within the particular setting and usually go to contribution, effort, or status. Our research shows that both approaches, but especially the former, inform our understanding of bid protests.

When are offerors likely to believe they have been treated unfairly? Obviously, one answer is when they have been. But, most protests are not sustained. We are inclined to infer from this fact that most protestors have not been treated unfairly. However, we can test this hypothesis directly. If protests are largely a matter of perception and, given that perceptions are less certain than reality, it follows that the greater the number of offerors on a contract, the greater the likelihood one will be aggrieved. Obviously, if only meritorious protests are sustained, the number of offerors should have no effect on the likelihood that a protest will be sustained. This conclusion implies hypothesis 1 and its corollary:

H1: Contracts with more offerors are more likely to be protested than contracts with only two offerors.

Corollary 1: There should be no relationship between the number of offerors and the likelihood the protest will be sustained.

If hypothesis 1 is correct, the issue of perceived fairness is obviously crucial to an understanding of bid protests.

Fairness theory tells us that offerors will see the process as unfair when their payoff is incommensurate with their efforts (Leventhal 1980; Moorman 1991). We cannot test this presumption directly, but we can infer that those project proposals that are likely to impose substantial sunk costs on the offeror are more likely to lead to results that are perceived as incommensurate with efforts than projects that do not. By sunk costs we mean the acquisition of project-specific assets that must be acquired to respond to an RFP or an invitation to bid and that cannot easily be redeployed to other projects. In turn, we infer that project complexity (design-work requirements, etc.) will be positively related to the acquisition of project-specific assets. These inferences imply hypothesis 2.

Based upon our interviews, we think it likely that the more complex the project, the more likely it is that a material procedural error will be found in the source selection process. For example, the guided munitions program, while unique to the military, used largely known technology and had a small number of reasonably well-defined performance parameters compared with a tactical fighter program such as the F22 (Myers 2002), facilitating the price performance tradeoff that is part of solving a division problem. However, greater uncertainty about the technology increases the cost of assuring the capacity of the offeror to perform, increasing the search costs for evaluating qualified vendors, which likely increases the risk of error and exposure of the selection to a bid protest. This implies Corollary 2.

H2: The more complex the project the greater the number of bid protests.

Corollary 2: The more complex the project, the greater the sustain rate.

In the analysis that follows we use contract pricing, contract duration, project stage, object of contract, service vs. product and weapon vs. other, as proxies for complexity.

Moreover, we can infer that perceptions of unfairness will be moderated by experience with defense contracting, since experience should help calibrate expectations (Kahneman, Knetsch, and Thaler 1986). We can infer further that small firms, with fewer defense contracts, will tend to be less experienced than large firms, with more contracts, which implies hypothesis 3.

H3: Small offerors are more likely to protest source selections than large offerors.

Corollary 3: Bid protests from small offerors are less likely to be sustained than are protests from large offerors.

Finally, fairness theory tells us that status matters to perceptions of fairness. What is perceived as just depends not only on effort but on relative desert (Leventhal 1980). One observation, which struck us most forcibly during our interviews, is that domestic businesses believe they should be advantaged in this process *vis à vis* foreign businesses. This gives us hypothesis 4.

H4: American offerors are more likely to protest when they lose a source-selection competition to a foreign offeror than when they lose to a domestic offeror.

To test these hypotheses, we first set up an ordinary least squares regression where the dependent variable was the protest rate in each month during our time period. The independent variables were business size (number of employees); contract pricing (1, cost plus; 0, fixed price); number of offerors; winner's nationality (1, foreign; 0, otherwise); stage of project (1, R&D; 0, production); object of project (1, weapon; 0, non-weapon and 1, service; 0, product); contract duration; and a set of dummy variables for the contracting agencies.

We then used data mining software (Clementine and MiniTab, both produced identical results) to construct a series of stepwise models, starting with the strongest explanatory variable and continuing until all significant variables ($p < .05$) had been exhausted. The results are shown in Table 2. The results unambiguously suggest that we cannot reject hypotheses 1, 3, and 4. This analysis does not support hypothesis 2. Increased project complexity does not add significant value to this model.

Table 2
THE DETERMINANTS OF BID PROTESTS FY2004-2009

Step	1	2	3
Constant	0.000357	0.000337	0.000316
Number of offerors	0.5	0.5	0.6
T-Value	-5.67	-13.6	4.74
P-Value	0.005	0.001	0.042
Foreign winner		0.4	0.6
T-Value		4.25	23.82
P-Value		0.024	0.002
Business size			-0.5
T-Value			-17.76
P-Value			0.003
R-Sq	78.94	88.42	89.99

To check these results, at least in part, we used information on protestable contracts from FEDMINE's database on 65,000 contracts with solicitation numbers and identified as listed in FedBizOpps, matched to the protested contracts in our database of GAO decisions. That allowed us to conduct a logistic regression where the dependent

variable is dichotomous: 1, if protested, 0, otherwise. Unfortunately, the data from FedBizOpps included information only on the type of contract, the contracting agency, and the contract winner. Consequently, we could say nothing about hypotheses 1 and 3.

The results of this exercise are shown in Table 3. These results are consistent with hypotheses 2 and 4. They tell us that bid protests are more likely with cost plus than with fixed price contracts and with services than with products: more complex products and services generate more protests. Also, as above, awards to international firms are more likely to be protested. They also suggest that Navy and DLA contracts are somewhat less likely to be protested than Army, DOD, or Air Force contracts.

Table 3
PROTESTS IN FY2004-2009

Logistic Regression Table					
Predictor	Coef	SE Coef	Z	P	Odds Ratio
Foreign Winner	1.4803	0.2056	0	0.009	0
Size of Contract Winner	0.3472	0.2786	1.25	0.003	1.42
Contract Pricing	1.5052	0.3336	4.51	0.000	4.53
Service vs. Product	0.2825	0.2133	1.32	0.009	1.32
Navy	-0.6747	0.2005	3.37	0.001	1.96
DLA	-1.3110	0.1459	8.98	0.000	3.71

What about the corollaries? See Table 4, a logistic regression on 635 protests between 2004 and 2009, where the dependent variable is 1 if sustained and 0 if denied. Corollary 1 is disconfirmed. The number of offerors is significant and has a positive correlation, which means that the greater the number of offerors the greater the likelihood that a protest will be sustained. Corollary 2 cannot be disconfirmed.

The chi-square table shows that there is a strong correlation between staging (level of complexity of the contract) and GAO decision. Further, corollary 3 cannot be rejected. A strong and highly significant relationship exists between the size of the protestor and the sustain rate. However, we cannot discount the possibility that the sustain rate of domestic firms against foreign firms is the same as the sustain rate of domestic firms against domestic firms or that there is no difference between the sustain rates of the various defense agencies. An interesting fact, which we had not earlier noted, is that foreign-headquartered firms rarely, if ever, protest source selection decisions.

The surprising result with respect to corollary 1, which does not seem to be entirely consistent with GAO impartiality, together with the absence of evidence that foreign winners are disadvantaged relative to domestic winners in GAO hearings, is somewhat puzzling. Our interviews suggested one possible resolution of this conundrum: rejected offerors who think they have a political advantage before the GAO are simply more likely to protest. This is manifestly the case with respect to domestic rejected offerors and foreign winners. But it may also be the case that where there are a

Table 4
LOGISTIC, STEPWISE REGRESSION OF SUSTAINED PROTESTS FY2004-2009

Step	1	2	3	4
Constant	0.1524	0.1441	0.1203	0.1295
Protester Business Size	0.137	0.131	0.134	0.131
T-Value	3.1	2.98	3.05	2.98
P-Value	0.002	0.003	0.002	0.003
Project Stage		0.115	0.121	0.112
T-Value		2.06	2.18	2.02
P-Value		0.039	0.03	0.044
Number of Offerors			0.064	0.064
T-Value			2.05	2.06
P-Value			0.04	0.04
Number of Criteria				-0.102
T-Value				-1.85
P-Value				0.045
R-Sq	25.3	52.3	68.7	73.4

large number of offerors, since it is more likely that one or more will perceive that they have a political advantage in this venue.

To investigate possible political bias in GAO decisions we confronted the issue directly, looking at the effect of congressional influence on bid-protest decisions handed down by the GAO versus those handed down by COFC.⁶ In Chart 13 we show the GAO sustain rate for bid protests by type of protestor (large, small) and by the protestor's representation on House and Senate Defense authorizing and appropriations committees. In Chart 14 we show the COFC sustain rate by type of protestor (large, small) and by the protestor's representation on House and Senate Defense authorizing and appropriations committees. Both show that bid protests by large firms are more likely to be sustained than protests from small firms. Further, using a X^2 test, we cannot reject the null hypothesis that there is no difference between the sustain rate for small firms in the two venues. That is not the case with respect to large firms. Representation on a greater

⁶For each bid protest, we coded the geographical location of the headquarters of the winning contractor by state and Congressional district for every winner and protestor. We then recorded whether the senator or congressperson representing each of these locations sat on one of the four congressional committees or subcommittees with direct oversight responsibility for DOD. The range was 0 to 3, meaning some protesters effectively had no elected representatives on any of these committees; others had representatives on as many as three.

Table 5
CHI-SQUARE COEFFICIENTS

Binomial Variables

Chi-square

(df=1; p=0.05; critical value = 3.84)

	GAO Decision	Weapon vs Non-weapon	Product vs Service	K Duration	Protester Business Type	Number of Bidders	Staging	Number of Criteria
Weapon vs Non-weapon	0.0040							
Product vs Service	0.0620	71.7270						
K Duration	0.8250	3.4740	30.6430					
Protester Business Type	9.4980	13.1590	5.0510	0.8380				
Number of Bidders	3.2540	2.1900	0.3170	0.6030	0.8160			
Staging	4.9720	0.0100	1.2080	0.8060	2.2790	1.9680		
Number of Criteria	4.5030	0.0100	2.0340	1.4410	1.2430	0.0230	4.5570	
Type of Contract Pricing	0.0070	0.2960	4.4260	1.6950	6.7200	2.3780	3.1280	4.4420

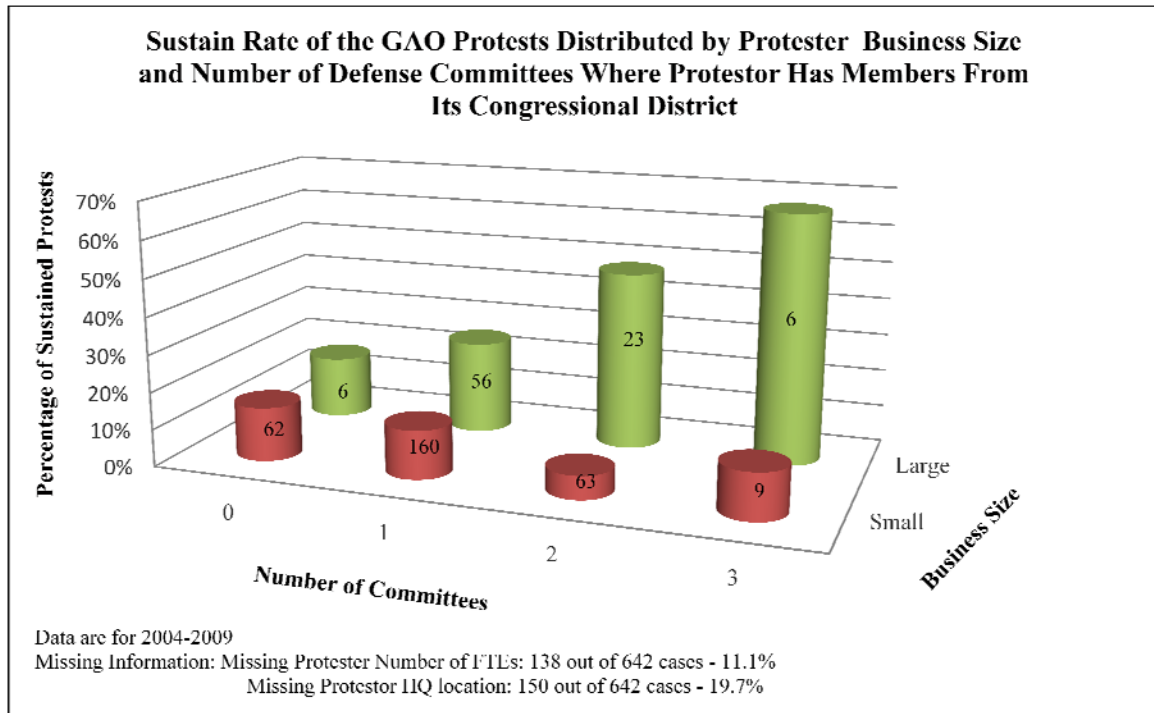


Chart 13

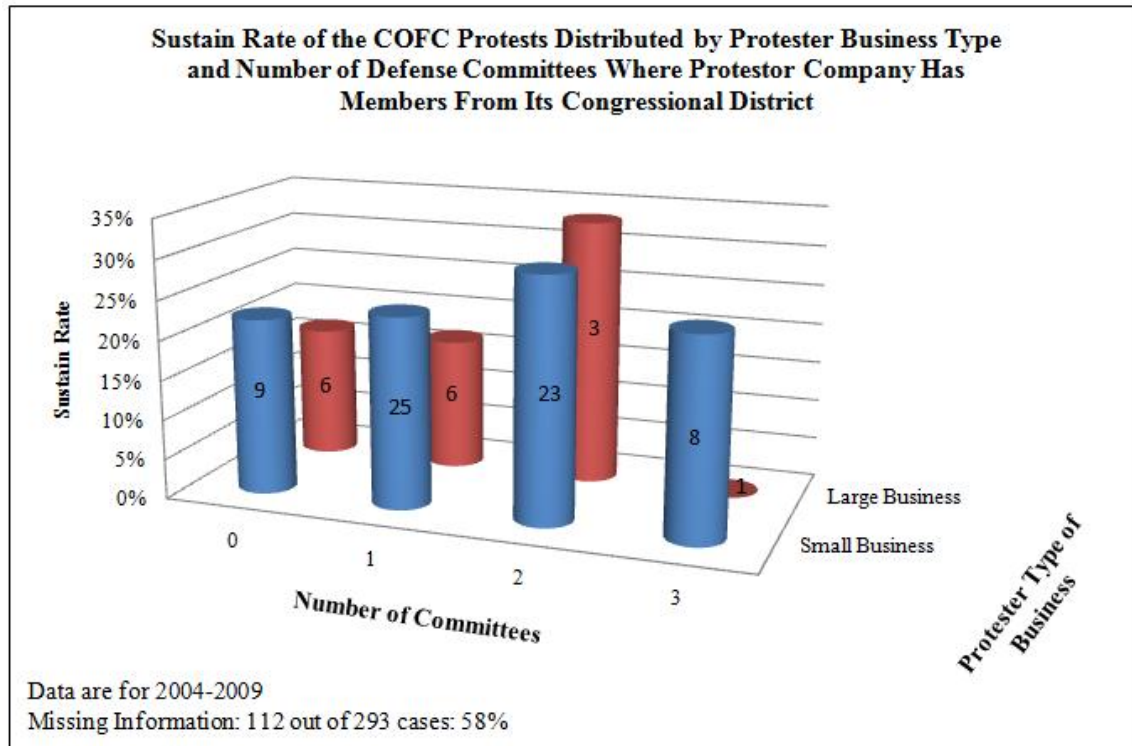


Chart 14

number of defense-related committees is associated with a higher sustain rate at the GAO but not at COFC. The X^2 value is 8.98, which is greater than the critical value of 7.82 (with degree of freedom equal to 3 and alpha level of significance equal to 5 percent). This was further confirmed by analysis of the standard error of the difference in skewness.

One would expect bid-protest decisions in COFC to be largely immune from political influence, because of the relative independence of the judiciary. Chart 14 is consistent with that expectation. It shows no evidence of a relationship representation of the protesting company on military-related committees and sustain rates. That, of course, does not mean that COFC has no political biases, merely that there is no evidence that it is responsive to congressional influence.

Moreover, regression analysis showed that rejected offerors from politically influential districts were more likely to protest and to prevail before the GAO, but not the COFC, than rejected offerors from less politically influential districts or foreign firms.

Certainly, defense agencies buy a lot of stuff from private businesses. And, they have a lot of discretion about where defense dollars go and who gets them. This affects local economies and cuts across political jurisdictions. Employees are voters. Many Americans fear that politics affects contracting agency decisions. Ostensibly, Congress authorized GAO as a countervailing force to offset agency bias, serving as an impartial arbiter of bid protests.

Furthermore, GAO steadfastly maintains that its decisions are independent of Congress and political pressures. Indeed, according to the former associate general counsel, elected officials welcome GAO's independence because they can recommend that a complaining constituent go to GAO for an independent review. If GAO sustains the protest, it is in the nature of electoral politics that the senator or representative will take credit for that assistance, even though taking credit undermines the perception of GAO's neutrality that elected officials value.

While members of the business community value GAO's role in resolving bid protests quickly and effectively, they also have difficulty believing that GAO is indifferent to congressional interests. It would be no surprise to learn that Congress created the GAO bid-protest mechanism to serve its concerns, and we have some evidence that it does.

The impact of management practices on bid protests

In theory, management practices and their alignment impact the performance of DOD contracting agencies through their influence on the configuration transactions that comprise the source selection process. These practices bear on the endemic risk of protestable errors. Our interviews provide insights and evidence into how this happens.

Strategy

Acquisition strategies change (Rogers and Birmingham 2004). At least since 1993 with the National Performance Review, strategy focused on simplicity, relying upon commercial markets, reducing regulatory burdens, and increasing the use of technology in the field. In the mid-90's, the government facilitated mergers and the consolidation of the industrial base, focusing on reducing costs and the war fighter as customer. Toward the late 90's, the buzzwords were re-engineering, consolidation, and elimination. By 2000, lowering total ownership costs and reducing overhead took primacy. The year 2001 brought a renewed emphasis on strengthening the industrial base and increasing the use of commercial technology.

With this came reallocation of the defense budget from overhead to war fighting capability. The Defense Department wanted the capability to respond to multiple, less predictable threats. Partly as a consequence, the size of the acquisitions workforce held constant as defense contracting increased. Performance measures took primacy over design standards. In terms of operating policy, a shift occurred from a DOD-centric technology—developed for and within the DOD military-industrial base—to commercial-centric technology development. This induced a shift from cost plus, multi-year contracts to performance contracts with milestone development. In terms of structure, the series 5000 series of DOD Directions and Instructions implicitly decentralized decision-making to the maximum extent possible while minimizing reporting requirements, which meant less monitoring (Dillard 2005).

From a dispute systems design perspective, this has three implications. First, changing strategic thrust refocuses the interests of contracting commands. Second, eliminating in-house production as an alternative reduces the leverage the contracting commands have when negotiating with contractors. Third, decentralized decision-making generates more conflict unless aligned with 1) a strategy that has a narrow scope, 2) human resource policies that increase staffing and provide professional development opportunities for employees to learn to collaborate, and 3) heightened monitoring to coordinate behavior (Roberts 2004 p. 239).

Structure

Looking at acquisition throughout government from a 30,000-foot level, a Senate staffer described a misalignment...

...between strategy and acquisitions. The management and strategy people come up with a great idea and chuck it to acquisitions to implement without sufficient attention to whether the idea is feasible. Acquisitions people are not involved in strategic decision-making. Historically, contracting was seen as mechanical and boring.

In part, the absence of strategic supply chain management stems from unresolved philosophical debates about the mission of government: what should be contracted out? With a Deputy Secretary of Defense for Acquisition, Technology and Logistics, DOD appears to have its alignment and structure better aligned than other departments.

Further down the chain of command at DOD, however, some respondents believe contracting officers should be involved in setting requirements earlier than they are. One contracting agency official said,

We're more effective if we're brought in early [setting requirements]. Often, we're presented with a solution in search of a problem... Sometimes we struggle to get the outcome to fit the acquisition strategy and, in that context, seams can gap and maybe generate a protest.

An example of the mismatch is a field command knowing the product it wanted, specifying the company to make it, selecting that company's design, starting to purchase it—a good product, but expensive and manufactured overseas—and handing it to the acquisitions agency to buy. The agency could not do a sole source contract without justification. It was put in the position of reverse engineering the product or doing a competitive procurement process. The field command, especially under time pressure, wants a product, and leaves the acquisition agency “on the ropes,” potentially exposing itself to a bid protest no matter what it does. Here, misalignment of structure—who decides—with operating policies—how to decide—and strategy—decide in favor of contracting out—exposes the agency to a protest because people with information key to the decision were not involved at the appropriate points.

Human resource management

Respondent comments took several forms but describe recruitment, training, and promotion practices that do not align with structure. Asked about the acquisitions workforce, many interviewees cite the reports showing that the number of procurement personnel remained unchanged while the dollar volume of purchases increased. An agency official described “over promotion” as the response to insufficient hiring: “Over promotion leads to poor judgments being made. You can’t create enough rules to deal with poor judgment.”

In the high tech area, reducing the number of engineers meant, according to one trade association executive,

Government doesn’t have the engineers it needs to specify requirements and to translate them into RFPs... There’s a disconnect, as a result, between the warfighter, the people setting requirements, and the contract officers who execute the solicitation and contracts.

Failing to align the knowledge, skills and aptitudes of employees—either through training, recruitment, or termination policies—with their responsibilities and incentives, creates a risk of protestable errors.

Anticipating an increase in the acquisition workforce, another contracting official said:

My office can’t do with more people. We need more expertise. If I could hire twenty more people tomorrow, I wouldn’t do it. I can’t absorb them. I have no source selection expert pool to select from. I’d love to have a team leader. I’d love to have people with backgrounds in systems engineering. I have to teach them source selection, even for some team leaders. We need experience. Just knowing the FAR isn’t sufficient.

With as few as one week of training in business skills, technical professionals in government are handicapped in setting criteria, which is where protests often originate, and in communicating with stakeholders in the business community. In organizations where the engineers and scientists dominate the culture, the criteria may be so generic as to allow any offeror to qualify. The source selection workforce needs legal, financial, and engineering knowledge to be conversant with the major stakeholders in the process (see also Brown, Potoski, and Van Slyke 2008).

Some who acknowledge the availability of technical professionals also bemoan their understanding of the process. According to one former agency contracting officer, in some agencies a technical professional runs the bid decision-making process. In others, a program manager runs it. Neither is well schooled in the rules and regulations. In this view, the procuring contracting officer should run it. The Source Selection Authority can be a technical professional or a contracting officer but should have some technical expertise. The chair of the Source Selection Advisory Committee should be a technical professional. From a management practices perspective, it is not obvious that agencies

consistently specify the knowledge, skills, and aptitudes that align with the responsibilities of the jobs in a source selection.

People in the private sector see government staff involved in source selections as dedicated and professional, but rotating through positions in twelve to eighteen-month cycles while being asked to do things they have not had to do before, such as developing performance specifications. One business manager saw in the rotation an intention by agencies to mitigate favoritism by cutting off relationships that might develop among parties who work together over time. The knowledge, skills, and aptitudes of the replacements varied. A senior contracting agency official made the same observation. Another noted reorganizations happening as frequently as every six months, moving experienced people out.

A former contracting official believes inadequate training results in errors that form the bases for protests: “You never want an offeror to say ‘You didn’t tell me to do this.’” Validating this, a business person believes most contracting officers try to do a good job when they write solicitations, but they are young and inexperienced; they do not understand the nuances of each solicitation. She used a quote, attributed by some to Will Rogers: “Good judgment comes from experience. Experience comes from bad judgment.” A contracting agency official said, simply: “I have too many green people.” He recommended a program where someone serves on a source selection as an evaluator at least once, then earned increasing levels of responsibility, and ultimately chairs an evaluation board.

A GAO official concurs with the thrust of these comments. In his view, the multiplicity of contract vehicles, with Congress changing the rules, challenges contracting officers and puts them in a state of constant crisis with insufficient time to understand the law, the vehicle, the market, and the evaluation. Yet time spent on training is time spent away from the office. With fewer of certain types of procurement, how are contracting officers to get hands-on experience?

Matching people with positions is a challenge even at senior levels. People rising through the ranks of combat commands move to acquisition. Can good operational officers be good managers? According to John Young, a former Under Secretary at DOD, military operators disrespect the acquisition side.

Military operators think they’re born leaders. The military believes that if it just puts contracting professionals around the military operator who is assigned to run acquisition, that will work. The Army has over the years had a handful of acquisition flag officers. Military operators who do not think much of acquisition officers control promotion boards. Until you show acquisition people that they have a good vertical potential, you won’t get the best people in acquisition.

A navy three-star officer once told Young that people in acquisition are people who could not “make it” in operations, and moved out.

The incentives for participating in source selections do not always align with the strategic importance of the activity. At Agency A, the contracting officer is assigned full-time to source selection, at least for big projects, so his or her personnel records will reflect performance in that domain. Even for a contract specialist on temporary assignment to a source selection, performance on the source selection is part of a performance review. To be promoted within the agency, a contracting official said,

...it helps to have a competition under your belt...You can't get promoted to a senior position in contracting [at this agency] without having been on a source selection team or managed a competition. When you apply for a more senior position with fifty others, you have to distinguish yourself. So, serving on a source selection team or managing a competition is something you want to do if you're ambitious. Hence, we tend to get our best and brightest on our teams.

Agency B strikes a middle ground, acknowledging that performance appraisal with respect to source selection is challenging, made more so by the dismantling of the National Security Personnel System (NSPS). If source selection activity is a significant part of an employee's responsibilities, it can be called out as an appraisal element. However, few people beyond the employee and supervisor see the performance appraisal; it is not used in merit promotion. A supervisor can always use good work in a selection as the basis for performance award nomination, but this is discretionary, not systematic.

Agency C recruits members informally to be on each of its source selection teams. Until very recently, personnel records made no mention of that. The agency had no useful tracking system to help match knowledge, skills, and aptitudes with responsibilities. Good performance on a successful selection might garner a letter of commendation but nothing permanent in an employee's file. It looks good on a resume but basically has no recognized impact on an individual's career. The agency relies on a sense of professional duty to staff its selections.

Finally, human resource management shapes an agency's culture, its shared attitudes, values, and beliefs. Like the operational commands they serve, all contracting commands share a culture of both service to a greater good and competition. Nonetheless, across and within military services, contracting agencies have different cultures that impact the way its employees interact with each other and with outside parties. For example, DLA, according to one contracting official, has different cultures at different locations. An office in one city is innovative and its contracting methods are closer to those used in the private sector. An office in a second city is traditional and transactional. A third office is free-wheeling: if there's not a rule against it they will do it. The innovative office does three times the business with half the people as the second office, partly because the nature of the products they handle and their approaches differ.

Within a single command at one geographical location, different units can have different cultures: science and technology with an engineering mentality; sustainment, dominated by blue collar workers in high volume production mode; and acquirers, dominated by white collar workers proud of giving birth to major weapons platforms by translating requirements into source solicitations. The clash of cultures will generate

conflict, potentially constructive, because the contracting commands depend upon cooperation for their success.

The multiplicity of cultures represents an information cost for outside parties who must accommodate to them. Vendors learn the differences, part of the endogenous transaction resources they glean from experience or from recruiting government decision-makers. A vendor described Naval Sea Systems Command (NAVSEA) as conservative; Naval Air Systems Command (NAVAIR) as willing to consider different ways of contracting. NAVSEA might use a cost plus contract where NAVAIR uses fixed price, even for the same items. Another sees Air Force senior officers exercising more discretion, an artifact of its breaking from the Army years ago, while perceiving the Army as more bureaucratic. Absent insights of this sort into the underlying interests of different contracting agencies, vendors may craft proposals that do not serve them, and then because of cultural misunderstandings, protest.

Processes and procedures

According to James Fesler and Donald Kettl (2005, p. 10): “Public organizations exist to administer the law, and every element of their being – their structure, staffing, budgeting, and purpose – is the product of legal authority.” This doctrine also implies the following normative imperative: government must give notice and fair warning about the rules governing its actions, which means that, in selecting sources for products and services, government must make its standards reasonably clear and apply them impartially and in a manner consistent with their meaning. The FAR and DFAR prescribe the steps that public officials must follow to comply with these imperatives.

In theory, then, the FAR, DFARS, and related statutes define much of the operating policies and procedures for the acquisition process. In practice, agencies view them differently. According to a Senate staffer, some agencies see the FAR as rules to be abided by. Others see them as guidelines. Others see them as suggestions. This may be due in part to the different cultures across the agencies. It raises the question, though, of whether potential offerors understand the differences. If they do not, the conditions are ripe for protests.

The multiplicity of policies, however valid each one may be, can be problematic. A legal practitioner says about the FAR and DFARS, “They’re so complicated that a good protest lawyer can always find grounds to protest.” The converse is that an agency official can always find a defense. Some agency officials disagree, believing the FAR are so specific that GAO will likely go against a contracting officer if there is any question about whether or not he or she followed the rules. The feeling is, “We’re guilty until proven innocent.” If these perceptions reflect reality, they validate the prediction that complexity combined with rigidity increases conflicts (Spiller 2008, p. 15).

Agency contracting officers, contractor executives, and bid-protest counsel identify two issues as the biggest risk factors in a successful source selection: 1) agency specifications of requirements and evaluation criteria, and 2) a company understanding

what the government wants and giving it to them. Requirements might not be defined adequately. According to a contracting agency official,

I could run a good source selection, prevail in a protest, but pick the wrong vendor, if the requirements are not specified correctly. And I won't know about my mistake until later. If I don't understand the requirements, I can set up a protestable situation without realizing it. Developing the RFP, especially in sections L and M, is like installing tracks for a train. At the evaluation stage, you're riding the train on the tracks.

To the extent that poorly formulated requirements are significant sources of bid protests, the problem is the inability of an agency to align its policies and procedures with its structure and human resource management so as to minimize errors.

Finally, as we noted earlier, in theory, the statutory rules through which Congress controls its agents in the bureaucracy and the GAO have a lot to do with assuring that agency decisions are fair, that is, with framing the resolution of division problems. In practice, these policies create an opportunity for exploitation. For example, rejected offerors have incentives to threaten to protest as a way to obtain a percentage of the award as a subcontractor to the winner, or to obtain a settlement payment from the agency to avoid a protest.

Agencies can neither facilitate this sort of "fedmail" nor make a payment to a protestor to withdraw the protest, although they have incentives to do so (Marshall, Meurer, and Richard 1994). It is not common, but it happens. If the contract is predicated upon having a list of qualified suppliers and an offeror has not been included in the list, a protest or threat of a protest has been sufficient to motivate the agency to add the protestor to the list. A prime contractor who won an award received a call from an agency saying, "fix this," with respect to a protest filed by another party: "make it go away," in effect. The agency says, "Get a subcontract with the protesting party by Friday at 4 PM or we'll withdraw the contract and reprocur."

This story sounds as though the government will receive a lower quality product or service, given that it rejected the offeror. That is not necessarily the case. The parties close to the contract could be using their endogenous transaction resources to resolve a problem. According to one prime contractor, it works like this:

The disappointed bidder files a protest. The agency assigns lawyers who have 30 days to file papers and documents. The winner intervenes and files papers. Then the disappointed bidder calls the prime and asks to get some of the work. This is typically the way it happens. Sometimes, the prime decides to do a buy instead of a build for some nifty widget that is part of its proposal. It calls the disappointed bidder, maybe a company that had been a manufacturer who has a cool technology but wants to become a systems integrator—only because the manufacturer has no experience with systems integration, its price is too high. The prime says that 'we'd like to buy the widget you can manufacture.' If a contract

with the subcontractor can be worked out, the protest is withdrawn, and this doesn't appear in the count of protests or corrective actions.

Or, a source selection bundles contracts for services at various military facilities. A contractor loses, maybe because it's a local company seeking to go national but cannot demonstrate financial or managerial capacity competitive with national offerors. It wants a subcontract for facility X and the national prime needs people, especially local people. The rejected contractor submits a bid protest within ten days and might wind up with that piece of the contract. Or, a prime contractor protests losing a large, long-term contract and the winning prime subcontracts with the protestor, who ultimately gets a sizeable share of the total contract worth a considerable value. The protests withdrawn do not appear in counts of either protests or agency corrective actions. However unseemly Congress might find agency involvement in these affairs, which is why agencies participate at their peril, they are examples of private parties resolving conflicts with their endogenous transaction resources.

Monitoring

At the agency level, people debate measures of performance. Some officials say, "We don't do any good if we don't survive a protest. So, we ought to manage to minimize protests." Other's respond, "That's terrible. Our job is to [deliver warships, fly planes, transport soldiers] and to protect the country, not to avoid protests." In this we hear the risk of misaligning the monitoring mechanism with the strategy.

Agencies measure their success in different ways. At DLA, if its customer is happy, DLA contracting officials see themselves as having done their job. They break that down to component parts to track their success: turnaround time of documents, responsiveness—do documents make it through review with few changes. These surrogate measures might align satisfactorily with the commodity-like materials that DLA supplies.

More generally, decentralizing decision-making and contracting out require a heightened combination of coordinated guidance, workforce training and motivation, and monitoring to avoid misalignment and the resulting errors that can give rise to bid protests. Emphasizing new technologies and performance contracting increases transaction costs. To minimize conflicts, proper alignment requires new contracting strategies, more sophisticated monitoring, and a more highly skilled acquisition workforce.

DOD has internal monitoring mechanisms, including procedural reviews, and GAO provides an external one. The level and types of reviews applied to the source selection depends on the size of the project, but could include, for example, reviews by a contract review board, a legal review board, and a peer review. In a memorandum dated September 29, 2008 the Under Secretary of Defense for Acquisition, Technology, and Logistics created a system for conducting peer reviews of contracts exceeding \$1 billion for supplies and services. It directed contracting organizations to design peer reviews for

contracts valued at less than \$1 billion. Some agencies already have constructed a series of internal review to manage risk.

Peer reviews take time and consume resources. According to OSD, peer reviews force a pause in the action by bringing in an outside group to ask the source selection team to explain what it is doing. If an agency's documents are in order, which OSD believes should not impose an additional burden on the agency, and the members of the peer review team read them in advance, then the peer review should add two to three days to the schedule for issuing the source selection strategy, the same before publishing the RFP, and about the same before announcing the award.

At least at one agency, reviews for projects valued at less than \$1 billion have proven effective but not foolproof because of the difficulty in catching errors through the review process. Information is costly and people make mistakes. According to a contracting agency official:

Reviewers ask whether acquisition personnel followed the evaluation criteria and of course they say "yes." But later, perhaps through a protest, when the details are even more closely examined, errors surface. It is hard to catch errors in a review due to the large volume of documents involved, many of which are not even part of the review package. Sometimes pricing errors can be easier to catch, but even there, that depends on what the reviewers have access to and how fine-toothed a comb they use. Certainly, oversight is important, but Total Quality Management says to focus on quality at the front end, not "inspect it" via later reviews. The person at the top has to rely heavily on the analysis and conclusions of the lower level staff, so the accuracy of the initial conclusions is critical.

This highlights a classic tradeoff among management practices. If the objective is to mitigate bid protests, solutions include: doing selections correctly in the first place, which means, among other things, investing in recruiting and training people for the acquisition workforce; anticipating protests and preparing for them by investing in documenting selection decisions thoroughly, which might as a side effect identify errors sufficiently early to be corrected at low cost; or, investing in more extensive monitoring through peer reviews. If the objective is to mitigate the impact of bid protests in terms of resources consumed and delays in delivering products and services, the appropriate solution should be governed by evidence on which alternative minimizes the sum of the costs of protests and the costs of avoiding them.

All of this reinforces the notion of the limits to endogenous transaction resources and the tradeoffs required to resolve problems. As one contracting agency official put it,

As more people become involved in setting requirements, as more stakeholders participate, which is not necessarily a bad thing, you start to have more problems. Everyone involved has their pet criteria and wants them included. And as you add people to help, you have to add reviews, and the more reviews you add, the more time required to answer questions from the reviewers, which takes you away from your task. If the standard for the acquisition process is zero errors, that will never

be met. The question is one of reasonableness. If one puts in place processes to 'perfect' the source selection so as to minimize protests, you'll create delays in producing the award that may exceed the delays caused by the protest process.

Moreover, protests, even sustainable protests, are inevitable regardless of the resources invested in a source selection. The visible example is the KC-Tanker competition. According to a contracting agency official:

One evaluation criterion was the performance of the aircraft in terms of its fuel-hauling capacity: it should exceed a particular threshold; the intent of the criterion was that the more your proposed plane exceeded the threshold, the better. That's how the evaluation team looked at it. The offerors appeared to have known that and never raised an objection to it, although the 'discovery process' in a bid protest typically does not allow an agency to review protester's notes and emails, so it is difficult to document that offerors 'knew.' This is something that matters in a legal sense, even in a protesting process where offerors have to protest the solicitation, pre-award, within a specific time if they should have known that something about the solicitation was in error, based on when it was 'reasonable' that they know. One grounds for protest was that, once a proposal exceeds the threshold, it satisfies that criterion, and that a bid exceeding it by more should not receive more credit in the evaluation. GAO sustained. Literally hundreds of smart people reviewed that requirement and no one caught that as a possible interpretation or source of a problem. GAO could say that it was not a defect in the solicitation that places a burden on the bidder to protest the solicitation; it was a defect in applying an evaluation criterion, supporting a protest of the award. Adding more smart people and more levels of review probably would not have caught that. At what point does GAO afford the agency discretion by a standard of reasonableness.

With respect to GAO as a monitoring mechanism that is part of the acquisition process, broadly defined, participants have few complaints. "Alternative dispute resolution works," said one bid-protest attorney. It provides a valuable, inexpensive way of resolving disputes, especially compared to the judicial process. Another said, "It limits the time you are spending a client's money. GAO helps the sanity of the acquisition community."

Two complaints arose more than once, however. First, bid-protest attorneys question the consistency of GAO's decisions. To obtain consistency, a GAO assistant director reviews the work of the drafting attorney. The associate general counsel signs every decision. Of thirty GAO attorneys, half have been at GAO for over twenty years, affording them considerable experience. They reviewed five years of data and found no significant change in their standard of reasonableness. In GAO's view, trial lawyers tend to find GAO more predictable than COFC. A GAO executive believes the 100-day statutory requirement for issuing decisions forces GAO to be highly systematic.

Second, implementing a corrective action or GAO sustained protest can be disruptive, triggering subsequent conflicts. A contract winner might support an agency

whose decision is being protested. The agency “caves,” as a protest attorney puts it, making a unilateral decision to take corrective action, at most giving the contract winner a “heads up.” The contract winner has expended funds to support the agency.

Moreover, unlike GAO’s 100-day deadline to make bid protest decisions, agencies have no deadline for implementing corrective actions. The agency retakes control and might not resolicit for a year. Meantime, the awardee has either distributed the members of its bidding team to other jobs, or it is expending resources on keeping the team together, just as it must keep its subcontractors together. In the case of a corrective action, the awardee has spent millions of dollars preparing its proposal but cannot recover those costs. If the protestor is an incumbent and the agency resolicits, the protestor can get more than 100 days of continuing work and revenue.

Aligning management practices to manage conflict and risk

The source selection process, given the transaction/information costs, is about managing risks: Technical risk concerns the ability of the product or service to perform to specifications. Financial risk concerns the ability to deliver the product or service for the price paid. Sustainment risk concerns the ability to maintain the product or service within budget. Congressional risk concerns political support for or interest in the product or service. Appropriation risk concerns the ability of Congress to continue funding the product or service. Reputational risk concerns the ability of the agency to execute a successful source selection or a contractor to be a responsible firm.

Bid-protest risk concerns the likelihood of drawing a protest. Asked to describe the factors critical to the success of a source selection, government contracting agencies will list:

1. Defining requirements;
2. Attracting adequate proposals that address the requirements;
3. Defining evaluation appropriate for the requirements;
4. Holding meaningful discussions;
5. Having appropriate price information;
6. Conducting the evaluation according to the rules and criteria you created;
7. Complying with a schedule; and
8. Triggering a bid protest.

The alignment of management practices influences the number and dimensions of these risks. Some of these, like design and production problems, are internal to the project. Others, like a change in demand for the product because of a change in the threat, a change in the availability of substitutes, or a change in the willingness of Congress to fund certain weapons, are external (Rogerson 1994).

DOD has developed a methodology for risk management, lodging primary responsibility with the program manager (Department of Defense 2006). It focuses primarily on three risks: performance, cost, and schedule. The term “source selection”

never appears. The term “contracting officer” appears twice. While it claims to apply to the entire acquisition process, it focuses more on contracting and contract execution after source selection.

Contractors asked to describe the factors critical for the success of a bid, list:

1. Compliance risk: complying with rules and regulations governing proposals;
2. Technical risk: having the capabilities to meet the technical requirements;
3. Cost competitiveness: having the ability to do this in a cost-competitive world; and
4. Risk exposure: making the intangible risk assessment about the company’s commitment to the contract, governed by experience, corporate culture, board of directors’ views, etc.

Many larger member companies of a trade association such as the Professional Services Council have chief risk officers (CROs). Agencies do not. According to one former contracting official, in the source selection process, no one is responsible for managing risk overall, identifying the complete range and extent of risks, and apprising decision makers of their options and tradeoffs in managing them.⁷

V. Recommendations

Contracting out will continue. Given the inevitability of human error, though, good source selection processes will not eliminate protests. The bid-protest system helps agencies find their mistakes and correct them while attempting to treat contractors fairly and consistently. It puts the decision to identify errors in the hands of parties who are appropriately motivated and are best informed (Kovacik 1995, p. 495). An alternative is to increase resources to inspectors general. Both options are subject to the same weakness: damage has already been done. Better to improve the source selection process, including bid protesting, to mitigate unproductive conflicts. From a management systems perspective, this has implications for agencies “doing it right the first time” and making cost-effective choices between *ex ante* and *ex post* management tools, as well as for the standards of reasonableness and materiality applied in GAO decision-making.

⁷ Some believe the Source Selection Advisory Committee identifies risks for the Source Selection Authority. The Cost Analysis and Program Evaluation (CAPE) combines program analysis and an evaluation unit, giving an independent assessment of risk along with the program officer’s assessment. In this view, the Source Selection Authority plays the CRO role from the outset. Establishing the acquisition strategy goes through all of the areas of risk and risk mitigation, and the acquisition plan is approved during a milestone review.

Managing the spiral of conflict

Best practice in dispute systems design suggests that disputes should be resolved at the lowest level because the parties at that level will have the best information, be able to respond most quickly, and be more likely to focus on underlying interests (Ury, Brett, and Goldberg 1988). That would be an agency review. Procurement agencies have not been aggressive in implementing alternative dispute resolution systems for three reasons (Nabatchi 2007). It is a relatively new concept, so agencies are not convinced that it serves their organizational interests. Few internal pressures exist to use it and external actors are not clamoring for it. We have little empirical evidence of its merits.

However, the concept is no longer new. The likelihood of increasing numbers of protests that forestall execution make agency level reviews more efficacious. The relative success of GAO's process testifies to the merits of ADR, as does DLA's well-developed process for agency level reviews: From 2004-2009, DLA has had a lower rate of protests at GAO than the Army, Navy, Air Force, or DOD.

The basic idea is to short-circuit the spiral of conflict by focusing the parties on solving a mutual problem, face-to-face, in a relatively informal process that they help shape (Carpenter and Kennedy 2001, pp. 26-29). Whether this will work with selections more complex than those typical at DLA is unclear. In any case, to make agency level reviews more credible, agencies should use staff trained in negotiation and mediation, preferably using parties different from those engaged in the initial decisions (Toff 2005, pp. 145-149).

From an incentive perspective, requiring agency level reviews gives agencies added incentives to document their decisions, especially if their responses become part of the record before GAO. If a rejected offeror lodges multiple protests with one or more agencies, who all conclude that the protests have no merit, and if GAO subsequently agrees, then after some number of protests, such as three in three years, GAO could be empowered to require the rejected offeror to begin compensating the agencies for their costs associated with responding to the protests. Failing Congress authorizing GAO to do that, GAO could begin documenting repeatedly frivolous protest behavior as part of past performance data that agencies consider in making awards. This merely makes transparent and systematic something contractors already believe transpires in obscurity and episodically.

Source selection processes that provide multiple opportunities for consultation before, during, and after decisions, with feedback after the decision follow good practice. A former contracting official suggests one-on-one conferences with clear rules before releasing the RFP; if anyone asks a question that is germane to all, publish it. If low-level dispute resolution fails, then dispute systems design calls for parties to move to the next higher cost mechanism, presumably GAO and, after that, COFC, with opportunities to loopback to encourage the parties to negotiate with each other.

Disclosure remains key to managing a spiral of conflict. To promote disclosure means, ironically, that agencies should assume rejected offerors will protest. In debriefings, agencies should supply them the same information provided to the Source Selection Authority to the level of detail where specifics about the winner must be redacted, which is to say, the same level of detail that the agency would provide in responding to a protest. Agencies should be able to explain to the offeror why that offeror was not selected; if the agency cannot do that in a debriefing, then it will not be able to defend itself in a protest.

A Source Selection Joint Action Team in the Office of the Secretary of Defense is looking at the consistency of debriefings. Taking steps to increase consistency and to serve contractors should help. If this happens, it should include opportunities for agencies or OSD to collect data about the quality of the debriefings to compare performance with expectations and, thereby, to continue to improve them. With so many selections conducted annually, a random sample could be sufficient. Anonymous feedback might be best, which could be difficult in source selections with few competitors. The key is to generate actionable information at low cost and get it to the decision-maker who can act upon it and who has incentives to do so.

A related recommendation is to mitigate the adversarial tone in debriefings. Rather than explaining how the rejected offeror erred and would have to change so as to help the agency, the debriefing official should describe what the offeror would have to do better to help itself. The offeror knows his or her company best, of course, so debriefing officers must leave it to the offeror to manage its proposal preparation better. Framing the feedback influences responses (Thompson 2009, p. 165).

Another procedural device is to record debriefings. This might obviate the need for attorneys to attend the debriefing, which puts agency officials on edge. It also obviates the need for protestors to solicit affidavits from everyone at their companies who attended the debriefing. It also supports GAO's job as third party intervener. A contracting official can say the same thing in debriefings to two different protestors; depending on the attitudes and interests of the protestors, one will find the contracting official unresponsive and the other will not. GAO can judge.

Good practice in dispute systems design envisions substantive decision experts engaging in dispute resolution, not attorneys. A bid-protest attorney offered this advice: Pre-protest, "do not admit a lawyer into any forum where the agency is on the other side, even the debrief, unless you've already decided to file a protest." This is a case where the logic is compelling to mitigate the chill in the room and to encourage more complete revelation of information. However, where operating policies and legal rules in the form of the FAR and DFARS are almost one and the same, this is untenable because, absent a lawyer, the rejected offeror might not understand agency decisions. An agency can restrict the number of people that attend a debriefing, but it cannot preclude the rejected offeror from bringing an attorney. If companies are required to have nonlawyers on staff who understood the contracting process, this advice could be more tenable.

GAO should monitor and be transparent about its standards of materiality and reasonableness and the processes by which they are assured. A higher standard might be appropriate for incumbents, either in terms of agencies providing a rationale for changing suppliers or in terms of GAO's standard of the reasonableness of an incumbent's claim. If an agency has had experience with an incumbent and still believes a new contractor is preferable, GAO could afford greater deference to the agency. This offsets, in part, the incumbent's informational advantage in the competition.

Aligning management practices

We apply principles of management and dispute systems design to address recurring appeals of source selection decisions. The key word is "systems." Management practices interact. Nonetheless, misalignments can be identified and adjusted.⁸

Strategy

Moving to market-based purchases may have gone too far. The planned addition of 20,000 acquisition professionals might be a signal of the real costs of competitive outsourcing. Consolidation in the industry exacerbates the problem. The optimal solution could include a combination of government ownership of specialized equipment and human assets, or, indeed, of the means of production. It requires reassessing the effective and efficient organization of the means of production, given the role that government decides to undertake and the full costs of production, transaction costs taken into account.

A strategy of contracting out presumes that all vendors are equally capable offerors. They are not. Firms with fewer than 500 employees generate the majority of protests, and the great majority of these are not sustained. Despite efforts by government agencies to facilitate access to procurement opportunities, to simplify contracting procedures, and to educate potential offerors, smaller firms may not have sufficient understanding of the contracting and bid-protest processes.

Those who participate in source selections and bid protests need the knowledge, skills, and aptitudes appropriate to their responsibilities. If voluntary participation in government or trade association educational programs is insufficient, government contractors could be required to have staff certified in source selection, qualified to participate in bidding and in a decision to protest. This is analogous on the source selection side of an acquisition to the expectation on the program side that government and contractors have certified project managers. This increases the costs to potential offerors, especially smaller ones. However, smaller ones are responsible for the lion's

⁸ Those who have found evidence of misalignment in DOD's acquisition management system also noted steps being considered to bring the components into alignment (Schinasi 2008). The proposed steps include reducing development cycles from 10-15 years to 5-6, testing a portfolio management approach to facilitate strategic choices, and capital budgeting. The presumption is that these will mitigate bid protests. We have not analyzed these recommendations.

share of the protests. A pilot project might show whether, like debriefings, the cost is worth it.

Structure

Contracting agencies could assign responsibility for identifying the risks in each selection and managing and mitigating them to a person, or perhaps the Source Selection Authority or the Source Selection Advisory Committee, with proper training. This function could take into account all of the variables central to the success of a source selection. The idea is to create a counterpart to the CRO in a private company. This person would step back to focus on process, asking how the agency is conducting itself and whether the agency is doing it correctly. It would be an *ex ante* approach designed to do the job correctly the first time that might cost-effectively replace the *ex post* approach of peer reviews that identify and require corrections.

Like other choices involving features of the management system, creating a CRO might have repercussions. According to John Young, saying something is important does not necessarily mean you should put someone in charge.

Having a CRO might absolve people who are responsible and accountable for dealing with the risk issues. Each team in a source selection makes a risk assessment in its area and the SSA might be tasked with aggregating it. Who should second-guess the subject experts? Who has the skills to do this? Government lives way beyond commercial products in the technology it uses. Who will assess that?

A CRO could be responsible for identifying the range of risks and putting in place processes to ensure they are addressed, rather than making the substantive risk assessment itself.

Policies and Procedures

Our two primary recommendations are neither new nor surprising. First, requirements, and thereby evaluation criteria, should be minimized, which means focusing on defining the need. Second, disclosure should be maximized.

A third recommendation is for agencies to create checklists, preferably based on best practices, at key stages of the source selection process. Pilots use them before taking off. Hospitals use them before, during, and after medical and surgical procedures. While there is no intent to intrude upon the exercise of competent discretion by acquisition professionals, the selection process has sufficiently routine sources of errors that checklists to mitigate risks could prove to be cost-effective.

A more aggressive recommendation is to require agencies who re-compete a contract—as a result of taking corrective action or as a result of a GAO opinion to amend or reissue the request for proposal—to do so within a specified timeframe, to publish why the timeframe can not be met (Schwartz and Manuel 2009, p. 14), or to request an

exemption from the limit. This assumes that Congress or Pentagon decision-makers are in the best position to judge the amount of time required to reassemble the selection team, whose members typically will have taken up other tasks once an award has been announced and GAO processes a protest. Monitoring the amount of time required with OSD-issued guidelines might be sufficient to secure agency attention to crafting the most efficient responses to sustained protests and corrective actions.

Human Resource Management

Contracting agencies could develop and use a simulation training program for source selection. The DOD uses simulations of battles, wars, budgeting, and logistics. Indeed, the military acquisition community uses DOD's Modeling and Simulation Information Analysis Center (http://education.dod-msiac.org/ms_primer.asp?a=s4&b-view&cl=272):

(1) to evaluate requirements for new systems and equipment; (2) to conduct research, development and analysis activities; (3) to develop digitized prototypes and avoid the building of costly full scale mockups; and (4) to plan for efficient production and sustainment of the new systems and equipment when employed in the field.

If simulations can be used for these purposes, and if simulations can be used for training war fighters in combat, surely simulations can be used to train people who supply the war fighters with the products and services they use in combat. The kinds of mistakes leading to bid protests are mistakes that can be mitigated by experience, which is part of the reason that peer review teams use people with, on average, twice the years of experience of people conducting acquisitions. Simulations, despite their limitations, provide opportunities to gain experience other than through on-the-job training when a mistake might become the basis for a bid protest.

Creating source selection simulations could support the peer review process, as well. The assumption that someone who has extensive experience with source selections knows how to examine and investigate them is potentially untenable. Standards exist for the proper execution of a source selection, which means peer review teams can be trained and provided with checklists to supplement their experiences.

The Professional Services Council worked with the Defense Acquisition University on a module dealing with the risk environment for procuring services. It is a simulation of a company's internal bid meeting. Government acquisition professionals are asked to play the roles of company decision-makers to understand how company people assess risks. The council offered to do this on a broader basis, an offer that should be pursued, especially if "broader basis" includes training government acquisition professionals to assess and manage the full complement of risks unique to their operations.

DOD appears to be addressing personnel turnover by experienced members of the workforce. Acquisition policy now requires program managers to sign tenure agreements

so their tenure corresponds to the next major acquisition milestone review closest to four years (Francis 2009). If this can be applied to other key members of the source selection teams, especially for complex products and services, it should help bring management practices into alignment and reduce errors that can lead to protests.

People should be incentivized to work on source selections. At minimum, recognition programs could distinguish performance of acquisition versus technical professionals. A related initiative would track employee participation in source selection activities, creating a database to support decisions contracting officers make when putting together source selection teams.

Monitoring

Measuring the success of a source selection will be challenging. Good practice is to have multiple measures. Asked how he knows whether a source selection was successful, a contracting officer said, “Well, I wouldn’t have a professor asking me what I do and why I do it.” However intangible that might be, worse measures exist. Compliance with a proposed source selection schedule, completing the source selection on budget, and having no sustained bid protests could be others.

The mantra: “If you don’t measure it you can’t manage it,” applies. DOD and Congress can improve upon the data they are collecting to monitor performance of the acquisition process from specification of need through contract award, taking into account bid protests or COFC lawsuits, as well as the time required for an agency to amend or reissue a request for proposal and complete the selection. The number and dollar volume of protestable contract actions can be tracked, as can corrective actions and protester reasons for withdrawing protests. This expands a recommendation offered by the Congressional Research Service to require GAO to include in its annual report to Congress the most common grounds for sustaining protests (Schwartz and Manuel 2009, p.15). Tracking this information will allow decision-makers to understand the dynamics of the system and to try to improve it. It also will induce decision-makers to manage to the measures being monitored.

Agencies should request feedback on the quality of the source selection process. For example, as one former company official put it, “if we win, lots of ills are washed over...unless a losing company protests.” Information about errors committed during a successful source selection can, if put in the right hands, prevent an unsuccessful one.

Whether mitigating protests or reducing delays or costs, part of the challenge is putting dimensions on the problem and its potential solutions. Six Sigma, Total Quality Management, Enterprise Resource Management, Business Process Engineering: all of these rely upon identifying a system, collecting information about operational features that reflect its performance, and then studying the data to make recommendations for improving it. Beginning with inadequate information results in inadequate recommendations.

This recommendation would include studying the efficacy of the databases that agencies use to judge company past performance, especially now that commercial databases on government contracting, like FEDMINE, have become available. The objective would be to use web technologies to assure that the most independent, contemporaneous, comparable, and reliable information becomes part of the past performance evaluation. More generally, this supports Snider and Walkner's call for periodically promulgating and updating best practices with respect to using past performance, supplementing the FAR and GAO decisions (2001).

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Appendix A: Research Methodology

To explore the implications of this analysis and its fit with reality, we reviewed an extensive literature on bid protests, interviewed participants in the acquisitions community, and read and coded GAO protest and COFC decisions. We conducted interviews during the last quarter of 2009 and the first quarter of 2010. Respondents included four attorneys and a manager at GAO; executives and in house counsel at four large prime contractors; four outside bid-protest counsel; government contract managers at two smaller companies who typically are subcontractors; three current or former executives in the Office of the Secretary of Defense; officials and in-house attorneys (as few as two, as many as fourteen) at three military commands: Air Force Material Command, Naval Air Systems Command, and the Defense Logistics Agency; a Senate Committee staff member; and executives (one or two at each) at professional and industry trade associations such as the National Contract Management Association, the Aerospace Industries Association, the Professional Services Council, and TechAmerica.

These interviews are not a representative sample of the acquisitions community, nor were they intended to be. They constitute a network, initiated through people we knew professionally and expanded as respondents recommended others who could share interesting and different perspectives. They offered their perceptions as individuals in the system, not as representatives of the organizations with which they are associated. Agencies use different processes; contracts differ on myriad dimensions; protests differ. People have different experiences with the system, which colors their perceptions. Their insights are suggestive, not definitive.

We based the questions in our interview protocols on a conflict management audit designed by Ury, Brett, and Goldberg (1988, Ch. 2), supplemented by questions generated from a review of literature on DOD procurement. Experienced contracting officers at three military commands reviewed and commented upon drafts of the protocols, which we then revised.

We also analyzed bid protests posted on GAO's website. We coded all digested decisions issued in calendar years 2001 through 2009.⁹ This gave us protests involving the air force, army, marines, navy and the DOD, not including the Army Engineer Corps because it operates under different federal appropriations statutes.

Given our focus on the potential for management processes at contracting agencies to trigger conflicts that generate protests, we focused on protests that GAO concluded had merit. We excluded from our analysis:

⁹ Search Criteria for the GAO database: ["unrestricted" in Product Classification] AND ["Issued by GAO's Comptroller General and the Office of General Counsel. Address matters of federal law brought to GAO's attention. Include Bid Protests and Appropriations Decisions" in Product Type] AND ["All Topics" in Topic] AND ["01/01/2001 - 12/31/2008" in Publication Date] AND ["All" in Strategic Goal] AND [("department of defense" in Organization Concerned) OR ("air force" in Organization Concerned) OR ("army" OR "navy" in Organization Concerned)]

- decisions associated with the Small Business Innovation Research (SBIR) program, because these were grants and did not comply with the standard process for acquiring products and services;
- decisions about requests from a vendor for reconsideration by GAO of its decision, typically requesting that GAO recommend awarding the vendor its bid protest costs;
- decisions to dismiss a protest on procedural grounds, such as the protestor missed a filing deadline or failed to provide factual basis for a claim; the protestor selected the incorrect venue, often when the protestor should have protested to the Small Business Administration under an SBA contract set aside program; or the protestor did not have standing, often when the protestor was not entitled to represent a government agency that submitted a bid in competition with bids from one or more private companies (A-76 program). We did not include protests dismissed on procedural grounds because these indicate protestor error or insufficient understanding of the bid-protest process. GAO reaches the decision to dismiss on procedural grounds without significant delay and without asking agencies to expend time and resources on responding to the protest. GAO has at times digested protest decisions on procedural grounds as a way to revisit and affirm its procedures for protesters, especially bid-protest attorneys.

We coded cases in terms of whether GAO denied or sustained them. We treated as single decisions situations where GAO issued reports simultaneously on multiple protests associated with one selection. In other words, we treated as a single decision a case where one protestor filed addenda or supplementary protests, or, where more than one bidder responding to a solicitation filed protests that were combined by GAO in issuing its decision.

Information about cases before the COFC came from a search of the Lexis/Nexis database for 2001-2008. We coded cases in terms of whether the protestor or the government was supported by the court. At the GAO, a decision to deny means that the protestor loses the protest; a decision to sustain means that the pro-tester wins the protest, although not necessarily the contract, and the GAO recommends remedial action to the contracting agency. A protesting plaintiff can bring suit at COFC and the government defendant can make a motion for dismissal. If the court grants the motion, the case will not be coded as a “sustain” because the protesting plaintiff has lost.

Three students at Willamette University’s College of Law coded the decisions. Legal details matter. Different interpretations of the requirements for a debriefing, for example, even though agency officials are reading the same sections of the Federal Acquisition Regulations that govern them, lead to different behavior. Government procurement rules and regulations are affirmative law, which means: as opposed to private contracting, the government can impose a requirement if it chooses; the contractor can not be held accountable for failing to meet a requirement if the government has not imposed it, and holding a contractor responsible for failing to meet a requirement that has not been imposed can be grounds for a protest. Understanding law and how to spot issues in GAO and COFC opinions requires legal skills.

Information about the financial characteristics of contract winners and protestors came from FEDMINE.US, an advanced database-driven web application that aggregates data from disparate but authoritative federal government sources, as did information about the political jurisdiction in which offerors are headquartered. Additional and confirming information about the contract solicitation numbers, values, types, and contracting commands came from databases such as FedBizOpps (fbo.gov), the Federal Procurement Data System (fpds.gov), and FedSpending.org, a project of the nonprofit OMB Watch.

Coding decisions affect the presentation of results. We coded as weaponry products to be used or to support combat operations in the battle space. Items that can be used directly by the Armed Forces to carry out missions (Defense Acquisition University Glossary of Defense Acquisition Acronyms and Terms 2010), such as platforms and munitions, are weapons, as are tanker aircraft and amphibious ships. Services, including security and K-9, and information technology and fuel, are coded as nonweapons.

Studying GAO decisions proved to be a nontrivial exercise. First, information about protests with merit that are sustained or denied generally include the same basic information but they do not always include information that would interest us: the source solicitation number for the contract being protested, which is the key to unlocking other information from public databases; the name of the contracting agency, which might allow us to determine whether some agencies tend to be involved in more protests than others, and when GAO recommendations for remedial action are taken by the agency and the results of the action. Missing information is a significant problem.

Second, out of necessity we sampled on our dependent variable, decisions protested. We required information about the universe of protestable contracts in each calendar year, which is not so readily available. We report analyses based on two approaches. First, we used information about the total number of contract actions per fiscal year from FEDMINE, which varies from zero to hundreds per contract, as a proxy. After reviewing samples of all contract actions in selected military services, we estimated, on average, 2.5 contract actions per contract per year, and applied this to data about the lengths of contract actions to estimate the number of contracts involved. This allowed us to look at all the variables we were interested in, but an inferior set of observations. Second, we obtained information about DOD contracts with source solicitation numbers and listed in FedBizOpps for fiscal year 2004-2009, which approximates the universe of protestable contracts, which we matched to our GAO bid-protest decisions from October 2003 through September 2009. This provided us with an accurate description of all protestable source selections and allowed us to accurately distinguish those that were protested from those that were not, but provided us with data on only a portion of the variables with which we were concerned.

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